91-244

No. ①

In The

Supreme Court of the United States

October Term, 1991

JAMES L. BARNES, JR., LEONARD GREFSENG, ROY R. KIMBERLY, LELLWYN B. LACKEY, WILLIE H. LITTLE, ELLIOTT H. MOORE, LILLIAN NORTHINGTON AND JOSEPH D. PATRICK,

Petitioners,

v.

A.S. LACY, D.C. REYNOLDS, ENERGEN BENEFITS COMMITTEE, ENERGEN CORPORATION, ENERGEN RETIREMENT INCOME PLAN, G.C. KETCHAM, G.C. YOUNGBLOOD, J.A. MARTIN, R.J. PATZKE, W.D. SELF AND ALABAMA GAS CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a lack of deceptive intent insulates from liability an ERISA fiduciary who, according to the district court, breached its fiduciary duty to plan participants by conveying to them, verbally and in writing, information which was inaccurate and incomplete, thereby inducing detrimental reliance while serving the fiduciary's interests.

2. Whether issuance of a summary plan description ("SPD") shields an ERISA fiduciary from liability, when the fiduciary subsequently conveyed to plan participants inaccurate and incomplete information which contradicted the SPD and which, according to the district court, breached the fiduciary's duties to the participant who relied upon the subsequent information.

3. Whether the law presumes reliance by plan participants upon an ERISA fiduciary's inaccurate and incomplete information, where the information was provided as part of the fiduciary's effort to serve its own interests by provoking early retirement decisions, and where the participants reviewed the information and then agreed to retire early.

4. Whether the court of appeals violated the holding of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), when it made dispositive factual findings that the district court did not make, and which were contrary to the district court's actual findings.

LIST OF PARTIES

All parties to the proceeding in the court of appeals are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

James L. Barnes, Jr., Leonard Grefseng, Roy R. Kimberly, Lellwyn B. Lackey, Willie H. Little, Elliott H. Moore, Lillian Northington and Joseph D. Patrick hereby petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, enabling this Court to review the judgment in *James L. Barnes, Jr., Leonard Grefseng, Roy R. Kimberly, Lellwyn B. Lacey* (sic), *Willie H.*

Little, Elliott H. Moore, Lillian Northington and Joseph D. Patrick, Plaintiffs, v. A.S. Lacy, D.C. Reynolds, Energen Benefits Committee, Energen Corporation, Energen Retirement Income Plan, G.C. Ketcham, G.C. Youngblood, J.A. Martin, R.J. Patzke, W.D. Self and Alabama Gas Corporation, Defendants, 927 F.2d 539, entered on March 22, 1991.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 927 F.2d 539 and is reprinted in the separate appendix hereto. (A-1).[1] A transcript of the district court's unreported findings of fact and conclusions of law is reprinted in the appendix hereto. (A-12). A transcript of the district court's unreported final judgment hearing, including findings and conclusions, is reprinted in the appendix hereto. (A-28).

JURISDICTION

The court of appeals entered judgment on March 22, 1991. (A-1). Petitioners timely filed a petition for rehearing, which was denied on May 9, 1991. (A-35). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] References to page numbers in the appendix hereto appear as (A-___).

STATUTES AND RULE INVOLVED

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), provides in pertinent part as follows:

> (1) . . . [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> . . .
>
> (B) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> . . .

Section 102(a)(1) of ERISA, 29 U.S.C. § 1022(a)(1), provides as follows:

> (a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in § 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with § 1024(b)(1) of this title.

Section 104(b)(1) of ERISA, 29 U.S.C. § 1024(b)(1) provides in pertinent part as follows:

> The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in § 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in § 1022 of this title every tenth year after the plan becomes subject to this part.
>
> . . .

Fed. R. Civ. P. 52(a) provides in pertinent part as follows:

> . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .

STATEMENT OF THE CASE

A. Introduction.

The district court, Judge Sam C. Pointer, found that an employer, Alabama Gas Corporation (hereinafter "Alagasco"), had voluntarily undertaken a responsibility to act as an ERISA fiduciary in communicating with its

employees, who were pension plan participants, about an early retirement program for which they were eligible. The court found that Alagasco had then breached that duty by conveying inaccurate and incomplete information to them, including all petitioners. (A-17-19). The district court cited Alagasco's written warning that the eligible employees should "keep in mind, however, that this is a one-time offer," a warning which was delivered while the employees were deciding during the three week "window" whether to retire under the program. The district court also found that this "one-time offer" representation was repeated verbally, and cited circumstances which "could and should have alerted the Company that [the eligible employees] would want to know the possibility of such an offer . . . being offered at a later date." (A-16-17). Two years after petitioners retired under the program, Alagasco offered a second and more attractive early retirement program to, among others, all employees who had declined enrollment in the first program.

The district court found that Petitioner Barnes had prevailed on his ERISA fiduciary claim because he had been wrongfully induced by the inaccurate and incomplete information to retire under Alagasco's first early retirement program. (A-20-21). The district court found that the other petitioners had not proved their reliance upon Alagasco's breach, rejecting their claim that reliance should be presumed in the circumstances in which the wrong information was given. (A-21-23).

The court of appeals reversed the district court's verdict in favor of Petitioner Barnes, and affirmed the dismissal of the other petitioners' claims, pointing out that Alagasco had acted in good faith because it did not

specifically intend to offer a second program at the time the "one-time offer" representations were made. (A-8, 10-11). In holding that Alagasco had not breached any ERISA fiduciary duties, the court of appeals also relied upon its own fact-finding, which directly contradicted facts found by the district court. The court of appeals relied upon, and attributed to the district court, a finding that "Alagasco had told its employees the truth about [the program]." (A-8, 10). The district court had *not* made any such finding, but had specifically found that Petitioner Barnes would not have retired "if he had been told the truth of the matter, the full truth. . . . " (A-21).

The court of appeals also concluded that because a summary plan description, issued two years prior to the first early retirement program, noted Alagasco's discretion to amend the plan, petitioners had been constructively placed on notice that Alagasco retained the right to offer a second program. (A-8-9). This "finding" by the court below also contravened the district court's findings, as we demonstrate specifically in Section IV of this petition.

B. The Facts Material to the Consideration of the Questions Presented.

In 1985, Alagasco decided to implement an early retirement program. It is agreed that two goals motivated this decision. First, Alagasco wanted to effect a long-term savings in its payroll and benefit costs. (R3-152). The program accomplished this purpose; the estimated payroll and benefit savings to Alagasco for fiscal year 1986 alone was $862,000.00 (R3-153). Second, Alagasco wanted to "restructure" its salaried workforce. (*Id.*) Alagasco's

president stated that he wanted to achieve these two goals at no cost to the company. (R4-298-300). To avoid spending its own money, Alagasco drew the program's benefits directly from the pension plan. (R4-326-327). Under the accounting and other rules governing employee pension benefit plans, Alagasco was able to do this without establishing any additional liability or expense with respect to the program. (P. Ex. 49, p. 2; R3-158-159).

Alagasco's officers testified that they wanted eligible employees to retire under the program. (R3-154-155 and 198; R4-302). Realizing that the manner in which the program was presented might affect the number who accepted it, David Self, the Alagasco Vice President in charge of designing and presenting the program, set about the task of scripting the program's presentation. (R3-198-199). It is undisputed that Vice President Self repeatedly instructed the officers who were to present the program that they should stress the "one-time" nature of the program, as well as the fact that the company "[f]ully anticipate[s] overwhelming acceptance." These instructions were stressed again and again, both verbally and in writing. (P. Ex. 22, 23 and 25; R3-178-180, 185-186).

With this script in place, Alagasco presented the program to the eligible employees. Mr. Self agreed that his earlier emphasis on the one-time nature of the program was consistent with the way the program was actually presented. (R3-186). At one of the first group meetings held to present the program, Mr. Self recalled that an employee asked what would happen if Alagasco did not attract enough acceptances: "Do you think you'll come

back and sweeten the pot?" The response of the Alagasco spokesperson was an unequivocal "No." (R3-171, 190).

Having heard this colloquy, Mr. Self then delivered to all eligible participants a letter formally announcing the program and warning them to "[p]lease keep in mind, however, that this is a one-time offer." (P. Ex. 1; R3-170-172). In using this language, it is undisputed that Alagasco intended to let the eligible employees know that the company was not going to come back and offer another enhanced window program if too few people retired under this one. (R3-155, 171).

At the subsequent meetings held by Alagasco to explain the program, the "one-time offer" representation was repeated on several occasions. (R3-7, 29, 42-43, 58, 100, 105, 129-130, 196-197, and 227).

Alagasco's president stated that throughout the process of presenting the program to the eligible employees, the company never intended to relinquish any of its corporate power to offer another early retirement program at any time. (R4-322-323). In fact, Vice President Self agreed that Alagasco intended to retain the discretion to announce, at any time it pleased, a second offer to the employees who turned down the first one. (R3-189). It is undisputed that these intentions were never revealed to the eligible employees, with the sole exception of those employees who were present at one departmental meeting during which an Alagasco officer indicated that the company would "never say never" regarding the possibility for a second opportunity. None of the petitioners attended this meeting. (R3-67-68, 77, 189-190; R4-323).

In several respects, Alagasco's communications about this matter departed from usual company procedure. Most significantly, it is agreed that the plan administrator had no involvement in presenting the program to the eligible employees, even though the plan document assigned to the plan administrator alone the role of preparing and distributing information to employees about the plan. (R4-248; P. Ex. 31, pp. 7-3 and 7-4). Contrary to this assignment, Alagasco handled all communications to eligible employees regarding the early retirement program. (R3-186-188; R4-243-244, 248 and 251). In another departure from normal procedure, the original draft of the letter to the participants, which was authored by Alagasco's chief benefits specialist and which contained no representation about future offers, was altered by Vice President Self to add the "one-time offer" language. (P. Ex. 20; R4-239). Ordinarily, but not in this case, Alagasco even secured the services of outside consulting firms to help draft communications to participants. (R4-246, 284-285; P. Ex. 18).

All of the written and verbal communications described above occurred within the three week period which ended on Friday, December 6, 1985, the date by which eligible employees were required to decide whether to retire under the program. (P. Ex. 1; R3-186). A consultant who testified for Alagasco at trial had previously informed Alagasco that the window period for accepting similar programs was generally from "two months to one year"; he testified at trial that the three week window used in this instance "would be about as short as I have seen." (P. Exs. 18 and 47, pp. 39, 55).

Under this deadline, each of the petitioners decided to retire pursuant to the program. Each of them denied any intention or thought of retiring at the time Alagasco approached them with the program. (R3-4, 5, 25, 26, 36, 42, 47, 57-59, 63, 95, 102-103, 111-114, and 124). Each of them read the written "one-time offer" representation and heard the verbal representations to that effect before deciding to retire. (R3-9-12, 16, 29-31, 42-44, 46-47, 61-63, 96-98, 105-106, 114-117, and 160). All petitioners also testified that they would not have retired at that time had Alagasco told them that the company might, if it wished, offer them a second chance if they turned down this program. *Id.*

Two years after telling petitioners that the early retirement program under which they retired would be a one-time offer, Alagasco implemented a second early retirement program. It is agreed that this second program was richer from the employee's perspective than the first had been, and that it was offered to a group of employees which included all of the employees who had decided to wait when offered the first program. (R4-268, 296; R3-199, 233). The "one-time offer" representations that had been made during the presentation of the first program were absent from any of the presentation materials used in connection with the second program. (R3-173-174).

When petitioners learned that the company had offered a second early retirement window to those who had waited, they complained in writing to Alagasco's president, reminding him that they had left their jobs on the express representation that they would not have another chance at early retirement. (P. Ex. 3). Alagasco

refused to consider their complaint, and this suit followed. (P. Ex. 4; R3-107; R4-314-316).

C. The District Court's Findings of Fact and Conclusions of Law.

The district court found that Alagasco had two objectives in implementing the first early retirement program: "First, a cost reduction; and second, making the salary force a little bit more lean in order to accomplish certain general reorganizations and restructure of those responsibilities." (A-15). The court found that at one of the first meetings held to announce the program, Alagasco fielded a question from an employee about whether this offer would be made available again in the future. (A-16). The court found that Alagasco answered this question by informing the group that the program was a one-time offer, "that one should not fail to take advantage of it in anticipation that the company would be making better offers at any later time, and that there was no target number of persons whom the company desired to accept the program." (A-16-17).

The court further found that this question could and should have alerted Alagasco "to the potential that employees would want to know the possibility of such an offer for enhanced benefits on early retirement being offered at a later date." (A-17). The court concluded that "[i]n its prepared materials, however, the company did not – as it should have – indicate to the employees that although there were no plans for any later offers and none were contemplated, that the company, of course, retained the right to consider and make offers at a later

time, including offers to the very individuals to whom this offer was being made." *Id.* The court found that the company failed to provide this information, and instead, persisted in describing the program as a "one-time offer." *Id.*

The district court defined Alagasco's fiduciary responsibility[2] in these circumstances as ensuring "that the information given was accurate and full and not misleading." (A-18). The court found that Alagasco had breached this duty by failing to inform the eligible employees, including all petitioners here, that the phrase "one-time offer" applied only to the precise window dates for the program, and that the company would retain the right "to consider and make future similar offers." *Id.*

The district court described Alagasco's communications as "misleading" and as less than "the truth of the matter, the full truth. . . . " (A-21, 25). In the final judgment hearing, the district court characterized Alagasco's information as "misrepresented matter." (A-32).

The district court then assigned to the plaintiffs the burden of establishing that they would have made different choices had the company provided them with accurate and full information on this subject. (A-19-20). The court found that all of them except Petitioner Barnes had failed to carry this burden, acknowledging that in making this distinction, it was "cutting a fine line." (A-20-23).

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[2] As the court of appeals noted, Alagasco dropped any contention that it bore no ERISA fiduciary duties in its role of presenting the first early retirement program to petitioners.

Subsequently, the district court held a hearing to determine the appropriate remedies for Mr. Barnes, and entered final judgment awarding him $93,664.28 and dismissing the claims of all other petitioners. (A-29, 33).

D. **The Court of Appeals' Decision.**

The court below, while professing to find no error in the district court's factual findings, made its own findings of fact and then relied upon them to reverse the district court's judgment against Alagasco for breaching its fiduciary duty. (A-2, 7-8, 10-11). For example,[3] where the district court had specifically found that Alagasco was guilty of failing to tell "the truth of the matter, the full truth," the court of appeals incorrectly attributed to the district court a finding that "Alagasco had told its employees the truth about [the first early retirement program]." (A-8, 21).

In addition, the court of appeals searched the record to determine that some evidence suggested that petitioners "might be said to have constructive knowledge" of the summary plan description's clause noting the plan sponsor's discretion to amend the plan. (A-8-9). The district court had not commented upon the effect of this summary plan description, which was issued two years prior to the verbal and written representations on which the district court premised its findings of fact. (P. Ex. 32).

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[3] In Section IV of this petition, the independent and incorrect "findings" by the court below are exhaustively contrasted with the actual findings of the district court.

In addition to these incorrect "findings", the court of appeals relied upon the district court's actual findings that Alagasco had not intended to deceive the eligible employees and had not intended or contemplated the announcement of a second early retirement program during the window period for the first program. (A-10-11).

The court of appeals also addressed the district court's finding that none of the petitioners except Mr. Barnes had proved reliance upon the faulty information. (A-7, n. 1). Even though this issue should not have been reached in light of the appeals court's finding that no breach had occurred, the court specifically held that the district court's reliance finding did not constitute clear error. *Id.* The court did not address petitioners' contention that reliance should have been presumed in the circumstances.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS IN ITS HOLDING THAT AN ERISA FIDUCIARY WHO CONVEYS INACCURATE AND INCOMPLETE INFORMATION TO PLAN PARTICIPANTS, THEREBY INDUCING DETRIMENTAL RELIANCE WHILE SERVING THE FIDUCIARY'S INTERESTS, WILL ESCAPE LIABILITY IF THE FIDUCIARY DID NOT INTEND TO DECEIVE THE PARTICIPANTS.

The court below placed dispositive weight upon the fact that Alagasco did not intend to mislead the eligible employees about the possibility for a second early retirement opportunity, and did not, in fact, contemplate or

intend to offer a second early retirement program. (A-8, 10). The court of appeals determined that Alagasco's communications could not be characterized, therefore, as material misrepresentations; on that basis, the court rejected the district court's conclusion that Alagasco had breached its ERISA fiduciary duties by providing inaccurate and incomplete information. (A-10-11).

The Eleventh Circuit's approach conflicts directly with that of other circuits. The controversy concerns whether ERISA fiduciary claims should be governed by principles this Court has developed to assess fiduciary conduct in another federally regulated field. Because the issue strongly affects ERISA fiduciaries' accountability to plan participants for issuing faulty and harmful communications, this conflict among the circuits merits the Court's attention.

ERISA's fiduciary provisions include the general requirements, applied here by the district court, that fiduciaries must serve their participants and beneficiaries "[w]ith the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1). This Court has emphasized that these standards "codif[y] and made [] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, ___, 109 S. Ct. 948, 954 (1989) (citing *H.R. Rep. No. 93-533, p. 11 (1973), U.S. Code Cong. & Admin. News 1974, pp. 4639, 4649)*. To ensure the full realization of this policy, the Court directed that "courts are to develop a federal common law of rights

and obligations under ERISA-regulated plans." *Id.*, 109 S. Ct. at 954 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)).

These teachings do not mark the first time this Court has recognized the need to adapt special rules from trust law to enforce fiduciary duties imposed by federal statute. In the context of federal securities laws, the Court has emphasized the distinction between a party dealing with another at arms' length, and a fiduciary advising its beneficiary:

> Nor is it necessary in a suit against a fiduciary, which Congress recognized the investment advisor to be, to establish all the elements required in a suit against a party to an arms' length transaction. Courts have imposed on a fiduciary an affirmative duty of "utmost good faith, and full and fair disclosure of all material facts," as well as an affirmative obligation "to employ reasonable care to avoid misleading" his clients. There has also been a growing recognition by common-law courts that the doctrines of fraud and deceit which were developed around transactions involving land and other tangible items of wealth are ill-suited to the sale of such intangibles as advice and securities, and that, accordingly, the doctrines must be adapted to the merchandise in issue.

Securities & Exchange Comm'n v. Capital Gains Research Bureau, 375 U.S. 180, 194 (1963). The Court refused to assume that Congress was ignorant of this evolution in the common law of fraud when it enacted legislation to prevent fraudulent practices by investment advisors. *Id.* at 195.

In contrast to the court below, other courts of appeals have not hesitated to reflect in their ERISA decisions this recognized need to hold fiduciaries to strict standards of diligence when they communicate with their beneficiaries. The D.C. Circuit, addressing a situation in which the ERISA fiduciary had told the literal truth, nevertheless found that the fiduciary had breached its ERISA duties by failing to discharge its "affirmative obligation to *inform* – to provide complete and correct material information on [the participant's] status and options." *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 751 (D.C. Cir. 1990). The D.C. Circuit pointed out that this affirmative duty to inform is stricter than the duty to refrain from "imparting misinformation." *Id.* The Eleventh Circuit in the decision below declined to impose this higher standard, choosing instead to measure Alagasco's conduct only against the duty to avoid making an intentional misrepresentation. (A-10-11).

The Eleventh Circuit's emphasis on Alagasco's lack of deceptive intent also places its decision in conflict with the Sixth Circuit's approach in *Berlin v. Michigan Bell Tele. Co.*, 858 F.2d 1154 (6th Cir. 1988). There, the court held that "the plan fiduciary [] had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering." *Id.* at 1163-64.[4] In determining that

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[4] The court below alluded to the *Berlin* court's holding that the ERISA fiduciary could be held liable only if a second early retirement program was being seriously considered at the time management denied that such was the case. This holding, contrary to the Eleventh Circuit's suggestion, cannot be

(Continued on following page)

negligent misrepresentations can constitute a breach of an ERISA fiduciary's duties to participants, the Sixth Circuit in effect held that good faith or a lack of deceptive intent would not shield a fiduciary from accountability.

The Third Circuit has agreed with the D.C. Circuit in holding that ERISA fiduciaries bear affirmative duties to inform. *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 (3d Cir. 1981). There, a fiduciary was held to have breached its duties in failing to inform pensioners of their employer's failure to make scheduled contributions to the fund. *Id.* But cf. *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404 (9th Cir. 1989) (Fiduciary bore no duty to inform participant of specific ways by

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(Continued from previous page)

applied in the absence of peculiar facts present in *Berlin*: There, the first retirement window had already closed when management was accused of making misrepresentations about whether a second offering might occur. Employees had begun to delay their normal retirement decisions in hopes of a future early retirement offer. This was causing a distortion in the normal pattern of retirements, and management only then began to represent that the first offering had been a one-time application and that managers considering retirement should not delay their normal plans. *Id.* at 1158. In this context, it would have been unfair to find that the employer had engaged in misrepresentations until it actually began considering a second plan. Thus, the *Berlin* court announced its precisely tailored holding on this point, which has no relevance here, where none of petitioners were considering "normal retirement" at the time Alagasco approached them about the first early retirement program. Moreover, unlike in *Berlin*, the ERISA fiduciary here stated *during the first window period* that the early retirement program would be a "one time offer" and that the company would not later "sweeten the pot" if too few employees retired. (R. 3-171, 190; P. Ex. 1; A-16-17).

which clear warning in summary plan description could apply to him).

While the decisions of the court below and of the D.C., Third and Sixth Circuits involved the ERISA fiduciary duties of care, skill, prudence and diligence, the Seventh Circuit, addressing the related ERISA fiduciary duty of loyalty, has held that "[g]ood faith is not a defense." *Leigh v. Engel*, 727 F.2d 113, 124 (7th Cir. 1984). While breach of the loyalty duty carries the implication that some measure of bad faith accompanied the fiduciary's conduct, the Seventh Circuit's flat refusal to consider good faith as a defense suggests that a fiduciary in breach of the duties of care, skill, prudence and diligence, would face a materially stricter standard in that venue than in the Eleventh Circuit.

Millions of employees rely upon their pension plan fiduciaries to provide them with information that is accurate and complete regarding their retirement benefits and options. Because the standard of care to which such fiduciaries are held will often be dispositive of claims brought by aggrieved participants, this Court should grant certiorari to resolve this conflict among the circuits.

II. THE DECISION BELOW PRESENTS AN IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW REGARDING WHETHER THE ISSUANCE OF A SUMMARY PLAN DESCRIPTION ("SPD") SHIELDS AN ERISA FIDUCIARY FROM LIABILITY, WHEN THE FIDUCIARY SUBSEQUENTLY CONVEYED TO PLAN PARTICIPANTS INACCURATE AND INCOMPLETE INFORMATION WHICH CONTRADICTED THE SPD AND WHICH, ACCORDING TO THE DISTRICT COURT, BREACHED THE FIDUCIARY'S DUTIES TO THE PARTICIPANT WHO RELIED UPON THE SUBSEQUENT INFORMATION.

A centerpiece of the Congressional effort to promote full disclosure to pension plan participants, ERISA's summary plan description provisions have been turned against plan participants by the decision below. This misapplication of ERISA's reporting and disclosure requirements undermines the very purpose of the statute and warrants this Court's attention. Moreover, the Eleventh Circuit's decision on this point again brings it into conflict with the D.C. Circuit's *Eddy* decision, as we demonstrate below.

Faced with the district court's finding that an Alagasco had induced a participant to retire by providing inaccurate and incomplete information about an early retirement program, the court below has determined that Alagasco cannot be held liable for breaching its ERISA fiduciary duties because the plan administrator had, two years earlier, provided the participants with a summary plan description ("SPD") which "might be said to have [given them] constructive knowledge" of the correct information.[5] (A-8-9). Specifically, the court of appeals

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[5] As we explain in Section IV herein, *only* the appeals court made factual findings about this matter.

determined that the SPD's statement that Alagasco could amend the plan constructively cured any confusion caused two years later, when Alagasco assured petitioners that the early retirement program was a "one-time offer" and that the company would not later "sweeten the pot" if too few employees retired. (A-8-9, 16-18; R3-171, 190).

No statutory or decisional basis exists for the Eleventh Circuit's novel use of a summary plan description ("SPD") to shield a fiduciary who, after issuance of the SPD, provides plan participants with additional, written information which contradicts the SPD and which would otherwise support a judgment against the fiduciary for breach of its statutory duties. The court below has created a defense which cannot be reconciled with ERISA's purpose or structure.

ERISA's fiduciary provisions clearly impose standards that apply to communications independently of the technical requirements governing summary plan descriptions.[6] As the D.C. Circuit has stated, "[a] fiduciary's duty . . . is not discharged simply by the issuance and dissemination of the [] documents and notices [required by ERISA's reporting and disclosure provisions]." *Eddy*, 919 F.2d at 750. ERISA's structure supports this view. Fiduciaries are required to discharge all of their duties with the "care, skill, prudence, and diligence" appropriate to the circumstances. 29 U.S.C. § 1104(a)(1). Nothing suggests that a fiduciary will be deemed, as a matter of law, to have fulfilled these fiduciary duties merely by complying with technical provisions governing

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[6] As the court below noted, Alagasco does not contest the application of ERISA's fiduciary standards to its communications with employees regarding the early retirement program. (A-4).

summary plan descriptions. Summary plan descriptions are required to be disseminated only once per decade, or twice if material changes have occurred during a five year period. 29 U.S.C. § 1024(b)(1).

The summary plan description on which the court below premised its decision was distributed two years prior to the announcement of the first early retirement program. (P. Ex. 32). The documents which contained the "one-time offer" representation comprised the sole written explanation regarding the first early retirement program. (P. Ex. 1; R4-238; See also R3-170, 175-176, 186-187 and 213-214). Yet the court below held that the inaccurate and incomplete information contained in that document was somehow cured by a provision in the previously issued summary plan description. This paradoxical holding demonstrates strikingly why this Court should determine whether compliance with ERISA's technical reporting and disclosure provisions excuses a fiduciary's subsequent issuance of other misleading communications to participants.

III. THE DECISION BELOW PRESENTS AN IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW: WHETHER THIS COURT'S DECISIONS INTERPRETING FEDERAL SECURITIES LAWS SHOULD BE APPLIED IN THE ERISA CONTEXT TO HOLD THAT THE LAW PRESUMES RELIANCE BY A PLAN PARTICIPANT UPON AN ERISA FIDUCIARY'S INACCURATE AND INCOMPLETE INFORMATION.

The court below rejected without comment the argument (advanced by all petitioners except Mr. Barnes) that the district court erred in failing to presume that they had

relied upon Alagasco's inaccurate and incomplete information by retiring under the first early retirement program.[7] To serve policies recognized by this Court in construing federal securities laws, courts presume reliance when stockbrokers fail to disclose information in breach of their statutory duties. Because reliance upon an omission is extraordinarily difficult to prove, whether this presumption should apply in the ERISA context is an issue which likely affects the outcome of many claims by ERISA participants and is thus worthy of consideration by this Court.

The Court has taught that when a stockbroker is guilty of a misleading omission to a client, it is not a condition of recovery under federal securities law that the client prove detrimental reliance upon the omission. This rule was adopted in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972):

> We conclude, however, that the Court of Appeals erred when it held that there was no violation of the Rule unless the record disclosed evidence of reliance on material fact misrepresentations by [the securities buyers]. [citations omitted]. We do not read Rule 10b-5 so restrictively.

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[7] The court below agreed in a footnote with the district court's finding that none of these seven had proved reliance upon the inaccurate and incomplete information. (A-6-7, n. 1). Because the court of appeals found that Alagasco had committed no fiduciary breach, it is quite arguable that its affirmance of the district court regarding these petitioners' reliance is nothing but dictum. However, in the event the court of appeals is deemed to have established the law of the case on this point, petitioners raise this matter now.

. . .

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. [citations omitted]. This obligation to disclose and this withholding of a material fact establish the requisite element of causation and fact. [citations omitted].

Id. at 152-154.

The former Fifth Circuit interpreted *Affiliated Ute* as allowing the trier of fact to presume reliance where securities plaintiffs could justifiably expect that the defendants would disclose material information. *Shores v. Sklar*, 647 F.2d 462, 468 (5th Cir. May, 1981) (en banc). According to the *Shores* opinion, this Court created the presumption "[b]ecause reliance is so difficult to prove when a defendant has failed to disclose a material fact rather than misrepresenting it." *Id.* Even the dissenters in *Shores* recognized that "a plaintiff faces almost an insurmountable burden if he is required to present affirmative evidence that he relied specifically on the defendants' silence with regard to a material fact. *Id.* at 475.

This Court should determine whether such a presumption applies where an ERISA fiduciary is found to have conveyed incomplete and inaccurate information to a plan participant. The Congressional purpose manifest in Rule 10b-5 also animates ERISA's fiduciary provisions. Just as Rule 10b-5 proscribes the omission of material facts to securities purchasers, ERISA prohibits fiduciaries

like Alagasco from omitting material facts when communicating the terms of employee benefit plans to participants and beneficiaries. The duty owed by an ERISA fiduciary to its participant is no less grave than that owed by a stockbroker to an investor. Similarly, an ERISA participant is in no better a position to prove that she retired in reliance upon a material omission, than a securities purchaser who must prove that she made a substantial investment in reliance upon such an omission.

Affiliated Ute and its progeny stand for a general proposition which fully comports with ERISA's protective purpose: When a statute commands disclosure of a fact which would be material to a reasonable person, the party who breaches the statute will not escape liability merely because the person to whom the facts should have been disclosed, cannot *prove* reliance upon the omission. In this circumstance, courts need not abandon the element of reliance; under *Affiliated Ute,* courts can presume reliance and place the burden upon the party breaching the statute to demonstrate that the claimant did *not* rely upon the omission.

For these reasons, the Eleventh Circuit's refusal to presume reliance merits this Court's attention. The Sixth Circuit, without citing *Affiliated Ute,* has held that an ERISA claimant would not be required to prove that he detrimentally relied upon a misleading summary plan description, on the basis that "Congress has promulgated clear directives prohibiting misleading summary descriptions," a purpose which the court determined would be undermined if courts imposed the "technical requirement" that an employee must prove detrimental reliance. *Edwards v. State Farm Mut. Auto. Ins. Co.,* 851 F.2d 134, 137

(6th Cir. 1988). In so holding, the Sixth Circuit has suggested that the Eleventh Circuit's approach may not be shared by other circuits facing this problem. Instruction from this Court would thus provide needed direction.

IV. THE COURT OF APPEALS WENT BEYOND THE BOUNDARIES FOR APPELLATE COURTS ESTABLISHED BY *PULLMAN-STANDARD V. SWINT*, 456 U.S. 273 (1982) WHEN IT MADE DISPOSITIVE FACTUAL FINDINGS THAT THE DISTRICT COURT DID NOT MAKE, AND WHICH WERE CONTRARY TO THE DISTRICT COURT'S ACTUAL FINDINGS.

In two respects, the court below engaged in the sort of independent fact-finding that this Court forbade in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). There, the Eleventh Circuit was found to have erred when it "made its own determination" of the legal effect of evidence it believed had been ignored by the district court. *Id.* at 292. This Court reminded the Eleventh Circuit of the "elementary" doctrine that when an appellate court "discerns that a district court has failed to make a finding because of an erroneous view of the law," or that "findings are infirm because of an erroneous view of the law," the only appropriate action is remand for further proceedings "unless the record permits only one resolution of the factual issue." *Id.* at 291-92. Here, the Eleventh Circuit has again failed to abide by this teaching.

First, the court below, while expressly declining to find error in any of the district court's factual findings, (A-2, 7), went on to mistakenly (and explicitly) attribute findings to the district court that the district court did not

make. The court of appeals stated that the district court found that "Alagasco had told its employees the truth about [the first early retirement program]" and that "Alagasco made no untruthful statements." (A-8, 10).

The district court made no such findings. In fact, District Judge Pointer's actual findings contain the following statement: "I conclude that in [Mr. Barnes'] particular situation, he would not have made the choice under VERO if he had been told the truth of the matter, the full truth – namely, the company was not foreclosing that option if matters should change." (A-21). The district court also found the following fact: "As to Mr. James Barnes, I conclude that he did rely on the misinformation and would not have made the choice of early retirement if it had been made clear that "never say never"; that is, that the company was not foreclosing the possibility of making another offer to the very same group of individuals at a later date." (A-20). Later, after announcing the verdict in Mr. Barnes' favor, the district court responded to defense counsel's question as follows: "Well, my view is that the company must bear responsibility for the decisions that in fact were made, to the extent they were in fact induced by misleading information." (A-25).

In view of these district court findings, it is clear that the court below erred in attributing to the district court the findings that "Alagasco had told its employees the truth about VERO" and that "Alagasco made no untruthful statements." (A-8, 10).

Second, the court below searched the record to find – and then rely upon – some evidence it interpreted as

indicating that petitioners "might be said to have constructive knowledge" of the summary plan description's clause noting the plan sponsor's discretion to amend the plan. (A-8-9). The district court had made no findings or comments about the summary plan description, which predated by two years the verbal and written misinformation on which the district court premised its findings of fact. (A-12-27; P. Ex. 32). In these circumstances, the court of appeals was empowered, at most, to hold that the district court had failed to consider relevant evidence, thus warranting a remand to the district court for this purpose.

By finding and relying upon facts that the district court did not find, and which were actually contrary to the district court's findings, and by searching the record to find and rely upon a provision in the summary plan description on which the district court had not commented, the court below failed to abide by Fed. R. Civ. P. 52(a), as strongly enforced by this Court in *Pullman-Standard*. Therefore, this Court should exercise its supervisory power to instruct the Eleventh Circuit to revisit its opinion and judgment without overstepping the proper bounds of appellate jurisprudence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(2)

91-244

No. ________

In The

Supreme Court of the United States

October Term, 1991

JAMES L. BARNES, JR., LEONARD GREFSENG, ROY R. KIMBERLY, LELLWYN B. LACKEY, WILLIE H. LITTLE, ELLIOTT H. MOORE, LILLIAN NORTHINGTON AND JOSEPH D. PATRICK,

Petitioners,

v.

A.S. LACY, D.C. REYNOLDS, ENERGEN BENEFITS COMMITTEE, ENERGEN CORPORATION, ENERGEN RETIREMENT INCOME PLAN, G.C. KETCHAM, G.C. YOUNGBLOOD, J.A. MARTIN, R.J. PATZKE, W.D. SELF AND ALABAMA GAS CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDIX

James L. BARNES, Jr., Plaintiff-Appellee.

Leonard Grefseng, Roy R. Kimberly, Willie H. Little, Elliott H. Moore, Lillian Northington, Joseph D. Patrick, Lellwyn B. Lacey [sic], Plaintiffs-Appellants.

v.

A.S. LACY, D.C. Reynolds, Energen Benefits Committee, Energen Corporation, Energen Retirement Income Plan, G.C. Ketcham, G.C. Youngblood, J.A. Martin, R.J. Patzke, W.D. Self, Alabama Gas Corp., Alabama Gas Corporation, Defendants-Appellees, Appellants.

No. 90-7228.

United States Court of Appeals.
Eleventh Circuit.

March 22, 1991.
Rehearing Denied May 9, 1991.

Appeal from the United States District Court for the Northern District of Alabama.

Before FAY and JOHNSON, Circuit Judges, and PECK*, Senior Circuit Judge.

FAY, Circuit Judge:

Plaintiffs James L. Barnes, Jr., Leonard Grefseng, Lila Faye Huey, Roy R. Kimberly, Willie H. Little, Elliott H. Moore, Lillian Northington, Joseph D. Patrick, and Lellwyn B. Lackey sued defendants A.S. Lacy, D.C. Reynolds, Energen Benefits Committee, Energen Corporation, Energen Retirement Income Plan, G.C. Ketcham, G.C. Youngblood, J.A. Martin, R.J. Patzke, W.D. Self, and Alabama

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* Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Gas Corporation (hereinafter collectively referred to as "Alagasco"), alleging misrepresentation and violation of ERISA with respect to two early retirement plans that Alagasco had offered its employees. The district court granted judgment in favor of plaintiff Barnes, but held in favor of Alagasco with respect to the remaining eight plaintiffs. Seven of the eight plaintiffs who were defeated at trial appealed, and Alagasco cross-appealed the court's decision in favor of Barnes.

We find no clear error in the district court's factual findings. Accordingly, we AFFIRM the court's order granting judgment in favor of Alagasco with respect to the eight defendants other than Barnes. However, we hold that the court erred in finding Alagasco liable for misrepresentation. The court found Alagasco liable because Barnes misunderstood and detrimentally relied upon Alagasco's representations; yet it found, as a matter of fact, that Alagasco had made only truthful representations, in good faith, to its employees. We find that, based on the court's factual findings, its holding against Alagasco was erroneous as a matter of law. Accordingly, we REVERSE the district court's order granting judgment in favor of Barnes and REMAND with instructions to enter judgment in favor of Alagasco.

Background

In November of 1985, Alagasco announced that it was forming a Voluntary Early Retirement Opportunity plan ("VERO"). The plan was adopted to provide additional incentives for employees, who already were eligible to take early retirement under Alagasco's Retirement

Income Plan (the "Energen Plan"), to elect to do so. VERO was available only to those employees who either were already eligible for early retirement or would be by January 1, 1986.

About 80 persons were eligible under VERO. Over 50 percent of those eligible elected to retire on the basis of VERO. Nine of those persons who retired under VERO ultimately sued Alagasco asserting that, although they voluntarily and without coercion had elected to take that early retirement, they had been induced to do so by misleading or ambiguous statements provided to them concerning VERO.

This claim of misrepresentation essentially arose out of Alagasco's announcement in November of 1987, two years after VERO, of a new opportunity for early retirement. This second program, Voluntary Retirement Incentive Program ("VRIP"), provided various benefits that were greater than those which the plaintiffs had obtained under VERO. Plaintiffs asserted that the company misadvised them concerning the original plan by announcing at that time that it was a "ōne-time offer." They claimed that they understood Alagasco's comment to mean that they would not have any later opportunity for enhanced early retirement beyond that provided under the plan itself. Alagasco asserted that its use of the words "one-time offer" was proper and not misleading, and that it related essentially to the window of time from November 15, 1985 through December 6, 1985, in which eligible employees could elect to take advantage of VERO.

In its findings of fact, the trial court determined that plaintiffs had failed to show that Alagasco either contemplated or intended to offer a voluntary retirement incentive plan subsequent to VERO. Clear evidence offered at

trial established that in late 1985, when Alagasco had decided to make VERO available, Alagasco did not anticipate that it would make any further or later offers of early retirement, that it believed that it would be unable to make any such offers on a cost-neutral basis, and that no such offers were, indeed, anticipated. Accordingly, the court found that Alagasco never intended to mislead plaintiffs. Quite to the contrary, the court held that Alagasco intended "to provide accurate and full information that the employees would need in order to make their own individual decisions."

Additionally, the court did not specifically point to any violation of ERISA on the part of Alagasco. Instead, it applied trust principles of fiduciary responsibility to Alagasco with respect to its explanation of the VERO offer. Alagasco does not contest whether it should have been held to the standard of a fiduciary under ERISA with respect to the employees under the VERO plan. Alagasco merely claims that, based upon the information available to it at the time in question, it made no material misrepresentation, either by false statement or omission, regarding the prospect of a subsequent early retirement incentive plan. Thus, even if it should be held to some standard of fiduciary responsibility, Alagasco maintains that it did not violate its fiduciary duty to its employees.

The court held that Alagasco did mislead eight of the nine plaintiffs by failing to disclose that the company reserved the right to consider making benefits available in the future – whether higher, lower, or the same – at any time it wished to do so. The court then weighed the testimony of the remaining eight defendants with respect to whether they in fact relied upon the "misleading" offer

to elect VERO. The court found that, in fact, only plaintiff Barnes would not have accepted VERO if the "correct" information had been given. Accordingly, the court granted judgment in favor of Barnes, and in favor of Alagasco as to the eight other plaintiffs.

Analysis

1. *Findings of Fact.*

Federal Rule of Civil Procedure 52(a) provides that a district court's findings of fact in actions tried without a jury may not be reversed unless clearly erroneous. Fed.R.Civ.P. 52(a); *United States v. Fidelity Capital Corp.*, 920 F.2d 827, 836 (11th Cir.1991). The rule also provides that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed.R.Civ.P. 52(a). If the court's findings are " 'plausible in light of the record viewed in its entirety,' the court of appeals must accept them even if it is 'convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.' " *Fidelity Capital Corp.*, 920 F.2d at 836 n. 36 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985)); *see also Worsham v. United States*, 828 F.2d 1525, 1526-27 (11th Cir.1987). The district court in this case made various findings of fact, most of which the parties do not dispute. The seven plaintiffs other than Barnes who have appealed essentially dispute only one area of the court's findings. They assert that the court clearly erred in finding that eight of the nine plaintiffs would have elected VERO even if Alagasco had disclosed such information to them.

In light of the record before us, the district court's explanation of its holding,[1] and the limited scope of our

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[1] As to plaintiff Huey (who did not appeal the district court's decision), the court found that she actually was notified of Alagasco's reservation of the right to offer benefits in the future. At trial, it was revealed that Mrs. Huey was present at a meeting where an Alagasco representative explained the meaning of "one-time" offer. The representative "indicated that there simply were no plans to have any such later offer made, but that of course, 'one could never say never' – the intent being and the content being that the company did reserve the right to make such decisions at a later date if it chose to do so." (R5-8-9). Therefore, the court held that Alagasco did not mislead Mrs. Huey.

The court found that plaintiff Grefseng had made his decision to accept VERO before he even learned of the "one-time only" condition. As a result, the court determined that Grefseng would have accepted VERO even if Alagasco had disclosed its right to offer subsequent benefits. Plaintiff Kimberly was in bad health and had considered retirement even before VERO was offered. Therefore the court concluded that he also would have accepted VERO even if he had known that a later offer might be made. As to plaintiffs Lackey and Moore, the court paid special attention to the fact that the benefits under VERO were substantially higher to them based upon their ages than they would have been under normal earlier retirement. Consequently, the court reasoned that the plaintiffs would have accepted VERO even if Alagasco had communicated the information regarding the prospect of future benefits to them. As to plaintiff Little, the court recognized that because he was already age 63 when VERO was offered, he simply would not have waited to take early retirement on the basis of a statement declaring "that the company, of course, might at some future time – which might be two years or three years or six years – have considered some additional early retirement plan." Plaintiff Northington was not actively working with the company, was unhappy with her position, and was expecting

(Continued on following page)

review, we cannot say that the court was clearly erroneous in judging the credibility of each of the witnesses. The district court acknowledged the speculative nature of testimony on this issue. Further, the court conceded that, in making a factual determination, it had to draw fine lines of distinction in crediting testimony. Although we recognize, as did the district court, that it did indeed cut a fine line in weighing the plaintiffs' testimony, such a distinction does not, alone, constitute clear error. We therefore AFFIRM the district court's grant of judgment in favor of Alagasco with respect to plaintiffs Grefseng, Kimberly, Little, Moore, Northington, Patrick, and Lackey.

2. *Conclusions of law.*

In contrast to the standard of review of findings of fact, our review of the district court's application of the law to its findings of fact is de novo. *Fidelity Capital Corp.*, 920 F.2d at 836 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 486, 104 S.Ct. 1949, 1952, 80 L.Ed.2d 502 (1984) (Rule 52(a) "does not inhibit an

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(Continued from previous page)

to request a transfer upon her return to work. So, the court determined that she would have accepted the plan notwithstanding Alagasco's failure to disclose the information. Finally, plaintiff Patrick was likewise unhappy with his job and received substantially higher benefits by retiring at age 57 than he would have under normal early retirement, even if he were age 62. As with the other plaintiffs, the court concluded that he would have elected early retirement under VERO even if Alagasco had related its intent to retain the right to offer benefits in the future.

appellate court's power to correct errors of law"); *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1227 (11th Cir.1990)). The district court made several factual findings regarding Alagasco's conduct. Alagasco had told its employees the truth about VERO. Alagasco had no intent to mislead employees regarding whether any future offers would be made following the VERO offer. The evidence clearly established that, at the time Alagasco made VERO available to its employees, "it did not contemplate making any further or later offers of retirement." (R5-4). Alagasco's comments regarding VERO being a "one-time offer" were not in and of themselves misleading. Despite these factual findings, the court held that Alagasco was, as a fiduciary under ERISA, liable for misrepresentation. The court found that Alagasco had committed a misrepresentation on the basis that the company's statements were subject to being misunderstood by employees. (R5-17). In effect, the court ruled that Alagasco had, and had breached, a duty to announce its intention to reserve the right to offer a subsequent early retirement plan, even though no such plan was even contemplated.

ERISA contains detailed disclosure rules by which employers and plan administrators must abide. *See* 29 U.S.C. § 1021 *et seq*. One such disclosure requirement is the publication of a summary plan description ("SPD"). The SPD is Congress's established method for apprising participants of the terms of a particular plan.

Alagasco's Energen Plan was the underlying retirement plan to which both VERO and VRIP added incentives for early retirement. Alagasco also published a SPD of the Energen Plan which described the terms of the plan. Article 8.1 of the Energen plan expressly states the

Alagasco's reservation of discretion to amend the terms of the Energen Plan: "The Board shall have the right to amend the Plan from time to time. . . . " The Energen Plan's SPD also expressly states Alagasco's power to amend the plan. Counsel for Alagasco has represented that both the Energen Plan and the SPD were available to all employees. The plaintiffs, as participants in the Plan, might be said to have constructive knowledge of the Plan language. *See Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676, 680 (5th Cir.1989) (plaintiff "charged with knowledge of the plan"). Additionally, the VERO plan itself was made pursuant to Article 8.1 of the Energen Plan. Alagasco complied with the disclosure rules mandated by Congress in ERISA. The district court, in effect, created an additional notification requirement by requiring Alagasco to announce again to its employees its intention to retain the right to amend its retirement plan. Alagasco made no untrue statements to its employees regarding VERO or VRIP. The company complied with ERISA regarding disclosure. Accordingly, the district court erred in holding Alagasco liable because its comments might have been subject to misinterpretation.

However, even if the employees did not receive notice of Alagasco's intention to retain the right to amend its retirement plan, we hold in the alternative that Alagasco did not breach any fiduciary duty towards its employees. Generally, employers owe no fiduciary duty towards plan beneficiaries under ERISA. *See Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 229 (3rd Cir.1989). However, when employers choose to "wear two hats," i.e., act as both employer and plan administrator, ERISA fiduciary duties regarding plan administration attach. *Id.*

at 225. Yet, employers who act as plan administrators " 'assume fiduciary status "only when and to the extent" that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA.' " *Id.* (quoting *Amato v. Western Union Intern., Inc.*, 773 F.2d 1402, 1416-17 (2d Cir.1985), *cert. dismissed,* 474 U.S. 1113, 106 S.Ct. 1167, 89 L.Ed.2d 288 (1986)). Neither party disputes that the employer, Alagasco, owed a fiduciary duty to the beneficiaries. Yet, even assuming that Alagasco owed a fiduciary duty to the plaintiffs in this case, the company did not breach such duty by failing to notify the employees of the amendment provisions in the plan.

The district court found that Alagasco made no untruthful statements. The "one-time offer" statements indicated Alagasco's actual intent at the time the statements were made. The court found that Alagasco acted completely in good faith with respect to both the VERO and VRIP incentive plans. We fail to see how a fiduciary could be held liable for making a good faith, truthful statement solely because the statement might be subject to misunderstanding. The district court, in so holding, placed an unreasonable burden upon Alagasco to predict future, unintended events. To impose such a duty is inequitable. *See Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1164 (6th Cir.1988). Alagasco could only be liable for such a predictive statement if it were a "material misrepresentation." *See id.* If, for example, Alagasco, "after *serious consideration* of a second [VERO] . . . , represented that [a later VERO offering] was not being

considered or used words to [that] effect, such a representation would be characterized as a material misrepresentation, although no final decision had been made." *Id.* at 1164 n. 7 (emphasis in original). In the case before us, Alagasco never even considered that a later offer would be made when it stated that VERO was a one time offer. Therefore we find that Alagasco made no material misrepresentation. Accordingly we REVERSE the decision of the district court granting judgment in favor of plaintiff Barnes. AFFIRM its decision against the other plaintiffs, and REMAND with instructions to enter judgment in favor of Alagasco as to all claims.

IN THE DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JAMES L. BARNES, et al.,	)	CV-88-P-1453-S
Plaintiffs,	)	Birmingham, Alabama
vs.	)	October 17, 1989
ALABAMA GAS CORPORATION, et al.,	)	2:15 P.M.
Defendants.	)	FILED 89 NOV 6 PM 4:17

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BEFORE HON. SAM C. POINTER, JR.

APPEARANCES:

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FOR THE DEFENDANTS:	HON. JAMES WALKER MAY HON. JOHN H. MORROW HON. JAMES S. CHRISTIE, JR. 1400 Park Place Tower Birmingham, AL 35203
COURT REPORTER:	Penny L. Enoch 325 Federal Courthouse 1729 Fifth Avenue North Birmingham, AL 35203

[p. 2] FINDINGS OF FACT
AND CONCLUSIONS OF LAW

THE COURT: The Court will now dictate findings of fact and conclusions of law. These findings are based upon the evidence that's been presented during the trial over the last two days. The evidence consists of testimony of various witnesses, together with the reception into evidence of various documents.

In November 1985, the defendant Alabama Gas Corporation announced the formation of something that in this litigation has been known as VERO, V-E-R-O, which stands for Voluntary Early Retirement Opportunity. This plan was adopted to provide additional incentives for employees, who already were eligible to take early retirement, to elect to do so. Various incentives were provided in order to induce the employees to take that election. The particular plan was available only to those employees who already were eligible for early retirement – or would be by January 1, 1986 – and who also satisfied a Rule of 80, meaning years of service plus age would be 80.

About 80 persons were eligible under that plan. Somewhat over 50 percent of those eligible elected to retire on the basis of that VERO. Nine of those persons now have brought this action against their former employer asserting that, although they voluntarily and without coercion had elected to take that early retirement, they had been induced to do so by misleading or ambiguous statements provided to them concerning [p. 3] that plan.

Basically, the claim arises out of and as a result of the announcement in November '87 of an additional opportunity for early retirement under what in this litigation has been called VRIP, or Voluntary Incentive Retirement Program. This second voluntary program provided various benefits that were greater than those which the plaintiffs had obtained under the VERO plan.

They have asserted in this lawsuit that the company misadvised them concerning the original plan by announcing that it was a "one-time offer", which they understood as a result of both written and oral communications to mean that they would not have any later opportunity for enhanced early retirement beyond that provided under the plan itself. The defendant asserts in this action that its use of the words "one-time offer" was proper and not misleading, and that it related essentially to the window of time from November 15, 1985 through December 6th, 1985, in which eligible employees could elect VERO.

Let me first say that to the extent the plaintiffs are claiming that by virtue of any ambiguity or omission they should simply have a right to rescind their earlier elections to retire, the Court concludes that is not a proper construction of law; instead, the plaintiffs in order to receive the benefits they seek in this litigation must establish that they [p. 4] relied upon some misinformation or omission, and, in short, that they would not have elected VERO if they had been given correct information.

At the outset of this litigation, the charge was made that even in November and December of 1985 – at the

time of indicating this was a one-time offer – the company might have contemplated or even intended to offer a later early retirement plan such as VRIP. The evidence certainly does not establish that position, and in fact the plaintiffs appear to have abandoned that type of claim. The evidence is clear that at the time in late 1985 when the company had decided to make VERO available it did not anticipate that there would be any further or later offers of early retirement, that it believed that it would be unable to make any such offers on a cost-neutral basis, and that no such offers were, indeed, anticipated.

To the extent there was any charge in this litigation initially that there was any intentional misleading of employees, the Court finds favorably to the defendant. The Court finds there was no intent to mislead. There was, indeed, an intent on the part of the company to provide accurate and full information that the employees would need in order to make their own individual decisions.

The Court also finds that there was no particular target or quota that the company had in mind for that initial program. The two objectives of that program were explained [p. 5] adequately to the then beneficiaries, and consisted first a cost reduction; and second, making the salaried force a little bit more lean in order to accomplish certain general reorganizations and restructure of those responsibilities.

It is appropriate, however – since this case does involve a claim of misrepresentation whether directly or indirectly or by omission – for the Court to carefully consider the particular representations that were made by

the company during the latter part of 1985 when the plaintiffs were called upon to make their election. The company first had several general meetings of employees, all employees, not limited merely to those who would ultimately be eligible for the VERO program. The general objective of those meetings was to announce the program and to give some assurance that this was not a part of any financial exigency on the part of the company, and was to be a purely voluntary decision by those who would be eligible for it.

Then within a matter of several days, a series of additional meetings were held scheduled by the company limited solely to those persons who were eligible under VERO. In preparation for those meetings, what's been described in this litigation as "packages" of information were prepared for each of the eligible employees generally outlining the nature of the plan, who was eligible, what the benefits were, and indeed attempting to show certain data for each individual employee [p. 6] in terms of the options as between normal early retirement, early retirement under VERO, and then normal or regular retirement at retirement age. Packages also were prepared for those who would present on behalf of the company this information concerning the type of discussion that should be had, and indeed even suggesting answers to possible questions.

At one of the very first meetings, one of the employees had asked about whether this would be made available in the future, and the information given was that this was a one-time offer and that one should not fail to take advantage of it in anticipation that the company would be making better offers at any later time, and that

there was no target number of persons or goal set as to how many people the company wanted to take these offers.

That information – if it was not already apparent – could and should have alerted the company to the potential that employees would want to know the possibility of such an offer for enhanced benefits on early retirement being offered at a later date. In its prepared materials, however, the company did not – as it should have – indicate to the employees that although there were no plans for any later offers and none were contemplated, that the company, of course, retained the right to consider and make offers at a later time, including offers to the very individuals to whom this offer was being made. Instead – as I have already indicated – the company in [p. 7] its formal presentations described this as a "one-time offer" without making clear that the meaning of that was that this particular program had to be accepted or rejected within the window before December 6th.

The general principles of trust law apply in a broad sense to obligations imposed on fiduciaries under ERISA. Ordinarily the company is not a fiduciary under ERISA. In this particular case, however, rather than having these matters handled directly through the Plan Benefit Committee, the company acted really simply as a corporate body in presenting this information and assumed fiduciary duties with respect to the information being given to the employees. Accordingly, although not ordinarily is the company obligated in any specific way with respect to information under ERISA – except as required by statute and regulations – the company on its own and

voluntarily took on that responsibility here as in the nature of a plan fiduciary.

There has been some suggestion and some argument made that the company in acting as a fiduciary had a special responsibility because of the potential benefit the company had through reduced savings resulting from those employees who did elect no longer being on the payroll. I reject, however, the argument that the company in some way has special obligations in this under any kind of self-dealing concept. On the other hand, the company did – by taking on these fiduciary responsi- [p. 8] bilities – have the responsibility to insure that the information given was accurate and full and not misleading.

By not giving the information that, although this was a one-time opportunity for this program, the company would, of course, retain the right to consider and make future similar offers, the company failed to give the information that the employees should have been given. Counsel have briefed the proposition as to what misrepresentation can consist of. In this particular case where there are fiduciary responsibilities, the obligation for full disclosure is greater than what it is in ordinary arm's length transactions.

In saying these various things, however, it should be emphasized the Court at the outset noted that the plaintiffs must establish that they were misled by those misrepresentations or failure to disclose, and that they would have made different choices if the company had – as it did for one of these plaintiffs – let it be known that "one can never say never".

One of the plaintiffs was at a meeting – apparently the only such meeting – where an answer to a question about what this "one-time offer " meant. The presenter at that meeting indicated that there simply were no plans to have any such later offer made, but that, of course, "one could never say never" – the intent being and the content being that the company did reserve the right to make such decisions at a [p. 9] later date if it chose to do so.

It may be noted that in preparing the questions and answers for discussion with union representatives, the company had anticipated – and to some degree, covered in those proposed answers – the very question that arises in this lawsuit. In those draft questions and answers, the suggested answer to one of the questions was that the company has no plans to offer again to salaried employees and does not plan at this time to offer it to hourly employees. If that type of communication rather than "this is a one-time offer" had been communicated, the Court would be inclined to have said there was nothing misleading or incomplete about the information given.

I do, however, conclude that the information was incomplete as it relates to eight of the nine plaintiffs. As it relates to Mrs. Huey who was at a meeting in which it was indicated that the "one-time offer" language did not foreclose the company from making an offer in the future, I must conclude that she did not rely upon the claimed misrepresentation here being made and must reject her claim.

I now turn to the other eight plaintiffs to evaluate the extent to which each of them did or did not rely upon this

information. All of them, by testimony, have indicated that they did rely on this information. And although their words were somewhat different, in general I think it can be said [p. 10] that they all indicated that, looking back now on the situation, they would not have made the choice to take early retirement if they had known that the company was reserving the right to make an offer, similar offer, or indeed even an enhanced offer in the future.

I have no doubt but that that testimony is believed by each of those persons to be accurate; that is, to state the truth of the matter. Obviously, there is a speculative nature as to that, because each such person is trying to respond as to how he or she would have reacted if matters had been different.

As to Mr. James Barnes, I conclude that he did rely on the misinformation and would not have made the choice of early retirement if it had been made clear that "never say never"; that is, that the company was not foreclosing the possibility of making another offer to the very same group of individuals at a later date.

Mr. Barnes was 56 at the time, had no particular plans about any early retirement, though the matter had at least occurred to him. He attempted to find out information concerning whether Sonat had made repeat offers to the same individuals. He went to one of the meetings prepared to ask such a question, and based upon the responses given, understood – and I think could well have understood – that there was a commitment that there would be no future offers of enhanced [p. 11] early retirement to this particular group of people.

I conclude that in his particular situation, he would not have made the choice under VERO if he had been told the truth of the matter, the full truth – namely, the company was not foreclosing that option if matters should change. I should at this time note that the change that occurred – that is, the announcement of the VRIP plan – came only really as a result of two intervening circumstances: One, a financially distressful situation for the company, at least from a budgetary standpoint as it was planning for its '88 year; and a change in accounting principles that, in effect, provided some additional funds in the trust that could be available for another early retirement incentive program.

I'll not keep the other plaintiffs in suspense, and instead simply say that as to each of the other seven plaintiffs that I have not already mentioned I'm going to find against them and conclude that they would, nevertheless, have taken this early retirement, the VERO, if the company had simply said that which it was obligated to say – namely, that it was not giving up its options to provide opportunities at a later date which might be more or less or the same as the ones being offered under VERO.

I recognize in making this decision that I am cutting a fine line by taking the testimony of one plaintiff, giving it full credit on this particular issue, and as to the other [p. 12] eight not giving their testimony on the same point credibility. I have struggled with the testimony given by each of the plaintiffs in order to make what I believe to be the correct decision.

I have already covered Mrs. Huey's situation. As it relates to Mr. Grefseng, he was 57 at the time and had generally planned to retire at age 62. He made his decision really before he had gotten the information about the so-called "one-time only" condition without, indeed, even knowing the full level of benefits.

As to Mr. Roy Kimberly, he was 61 years of age and he was in bad health at the time. He had considered a retirement situation. And I conclude in his case, as with Mr. Grefseng, that he would have retired even if he had known there was some option that the company had to make an offer at a later date which might be more or less than the offer then being made.

As to Mr. Lellwyn Lackey, he was 58 at the time and planned to retire at age 62. It should be noted as to each of these that the benefit level under VERO was substantially greater than an early retirement prior to age 62, and was greater than what the retirement benefits would be at age 62.

As to Willie Little, he was 63 at the time, he planned at that time to retire at age 65. I simply conclude that he would not have waited by a statement that the company, of course, might at some future time – which might be two years or [p. 13] three years or six years – have considered some additional early retirement plan.

As to Elliott Moore, he was 57 at the time and he planned to retire at age 62. As to Lillian Northington, she was 56, she planned to retire at age 62. She was unhappy with her present position, and indeed was expecting to request a transfer of jobs from her return to active work with the company. As to Joseph Patrick, he was 58, he

planned to retire at age 62, he was unhappy with his job. And for him, as to the others, I conclude that the corrective information that should have been given, nevertheless, would not have changed his decision.

By way of summary, I am concluding that Mr. Barnes has carried the burden of showing that he would not have made the decision that he did make had the corrective information been given, but that as to each of the other eight plaintiffs, they would have made the very same decision even if the company had made the disclosure it should have.

It should be noted that the information that should have been given, and as against which the Court must measure reliance, is not a disclosure that the company was planning to or would provide increased benefits. The only disclosure would have been that the company reserved the right to consider making benefits – whether higher or lower or the same – at any time in the future that it desired to do so. And [p. 14] it's only on the basis of that standard that I am trying to evaluate, have evaluated, the question of reliance.

A number of the plaintiffs, while giving their testimony that they didn't believe they would have selected early retirement if this had been known, were – when pinned down – much less clear in terms of, "well, if I had known that it might be *better* opportunities available later, I wouldn't have made that decision". These are, then, the factual findings the Court has made.

As to the situation of Mr. Barnes, it will be necessary to have further proceedings, or perhaps there can be

agreement as to the benefits lost by him. My understanding of the basic thrust of the complaint is that he would say – as all the other plaintiffs were saying in the request for relief – that he would have taken the VRIP option two years later, but that to the extent of the difference in the terms of the two offers as well as to the benefits lost really during the two years – two years salary matter – that those would be the losses that he would claim. Perhaps counsel can make a determination and find a way of resolving what the dollar amount of that would be without the need for further judicial proceedings.

In making these findings, I obviously do not expect either side to agree with the Court's findings. If there are, however, matters in these findings I have failed to cover – matters of dispute that I have failed to cover – I would [p. 15] appreciate if counsel could alert me to those now while this evidence is very clear in my mind. I've not attempted to cover all factual matters and all factual disputes, but instead simply to focus on those things that are critical to the outcome of the decision.

If counsel know of any matters – or if you think I have by slip of tongue misstated something that perhaps should be corrected – I would appreciate your advising me of those, or of those questions so I can address them now. Again, I'm not asking for any waiver of rights to file post-decision motions.

Do counsel know of any areas of factual disputes or legal disputes that I have not addressed?

MR. MORROW: If your Honor please, I didn't know who you wanted to go first. You haven't misspoke.

I mean, I didn't catch any misspeaks, and I don't have any quarrel with any of the facts as you found them.

I think that the plaintiffs have a problem, even under the theory that you have accepted that it was misleading not to include the remark that we had the right to do this again, to the extent that if that was pervasive because of the group and if they hadn't done it, hadn't accepted it, there would never have been a second offer and no damage. And you haven't spoken to that.

THE COURT: Well, my view is that the company must bear responsibility for the decisions that in fact were made, [p. 16] to the extent they were in fact induced by misleading information. I'm not sure if you're addressing that issue.

If the question you're raising is, well, if there had been nothing presented, no one would have done anything and no one would have gotten any benefits from it – if that's the kind of issue – I think from a legal standpoint is not a justifiable defense. But maybe I'm misunderstanding.

MR. MORROW: I guess I'm making a proximate cause argument. Their theory is nobody would take it if you had said this; and if we said this and done exactly what they said and nobody took it, then there wouldn't have been any VRIP, because nobody was going to repeat a futile thing. And therefore –

THE COURT: Well, my view is that people would have accepted it. A lot of people did, and my view is that at least eight of these nine plaintiffs would have

accepted, even if you had provided that correct information.

MR. MORROW: I think that's probably a pretty good argument in response to what I said.

MR. SMITH: Your Honor, in our last brief, one of the principles that we brought to the Court's attention about the fiduciary relation – I was just trying to find – I may be wrong, but I don't think this was in the self-dealing portion.

I think that under the fiduciary duty guidelines that the Court has used to find that the company should have done it [p. 17] differently, that there is a principle that plaintiffs need not show reliance.

In addition, in the Sixth Circuit in the related matter – and in this case, of course – the matter that the Court hasn't addressed of the summary plan description requirements, there is a direct holding that plaintiffs need not show reliance in order to recover for misleading communications.

THE COURT: Well, my view is that as it relates to the facts of this particular proceeding, that the plaintiffs must show reliance in order to obtain any of the benefits that the plaintiffs are seeking here. And it's not merely some voidable option where a company acting as a quasi fiduciary makes known in a fair and unintended way the summary of the plan or requirements, but with the unintended result of an ambiguous statement. I don't think the statements that were made were in and of themselves necessarily misleading. I think they were subject to being misunderstood.

And in that sense, I have believed that the plaintiffs were misled in the ambiguity of the statements that were given. But in that type of context, it is my view that they have to show they were misled to their detriment; that is that they would not have made the choice that they did make.

That's my view of the law in the area, and I did address it earlier in the context of self-dealing where you were talking about some higher standard. I do think it's a higher [p. 18] standard than simply in a transaction between two people at arm's length. I think there is an obligation for full disclosure, and a trustee or quasi trustee can be held for ambiguities that are misunderstood because of those ambiguities, provided there is some reliance upon it.

I wasn't trying to get into an argument with counsel on the matter, but simply see if there were any areas that could perhaps be clarified at this point so you knew what my ruling was. That is then the decision of the Court. Final judgment will not be entered as of this time.

Final judgment could be entered under 54(b) as to the other eight plaintiffs other than Mr. Barnes, but I see no reason to perhaps precipitate piecemeal appeals, should there be any. But I would expect counsel very promptly to see it you cannot resolve any kind of monetary dispute relating to Mr. Barnes's situation, so that we can go ahead and have a judgment entered that will start any time for appellate review, if it should be desired to do that.

(Court adjourned at 2:35 p.m.)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JAMES L. BARNES,	) Case No. CV88-P-1463-S
Plaintiff,	) Birmingham, Alabama
vs.	) February 27, 1990
	) 10:00 a.m.
ALABAMA GAS CORPORATION, ET AL.,	)
Defendants.	)

* * *

TRANSCRIPT OF FINAL JUDGMENT HEARING HELD BEFORE THE HONORABLE SAM C. POINTER, JR. UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	JEROME A. COOPER and JAY SMITH Cooper, Mitch, Crawford, Kuykendall & Whatley 409 North 21st Street Birmingham, Alabama 35203
For the Defendants:	JAMES WALKER MAY and JAMES S. CHRISTIE, JR. Bradley, Arant, Rose & White 1400 Park Place Tower Birmingham, Alabama 35203
Court Reporter:	KARLA R. ODOM, RPR-CSR 325 Hugo Black Courthouse 1729 Fifth Avenue North Birmingham, Alabama 35203

* * *

[p. 26] THE COURT: I will now dictate my findings and conclusions. These findings and conclusions relate to the [p. 27] issue of the relief to be granted to the plaintiff, James Barnes, as a consequence of the Court's earlier finding of liability on the part of Alabama Gas Corporation, the defendant.

The parties have stipulated to certain figures arrived at through negotiations, providing a framework for the Court's decision on this relief.

The central issue now remaining is the extent, if any, to which a monetary judgment may be awarded to Mr. Barnes that encompasses the lost back pay he sustained during the two year period that he was retired and during which he would not have been retired had the company made known to him its continuing right to make further changes in its Plan. I'm going to rule in favor of the plaintiff on this issue. And there are several reasons for doing so.

I am, of course, cognizant of the Supreme Court and Eleventh Circuit decisions which have been cited by both parties in their briefs. Section 502(a)(3) of ERISA authorizes the Court to grant injunctive relief to enjoin violations of the Act which is largely prospective in nature.

But it also, in Sub Part B of that subsection, authorizes the Court to grant other appropriate equitable relief to redress such violations. And this authorization is, indeed, in addition to the permission to grant other [p. 28] appropriate equitable relief to enforce the terms of the Act or the terms of the Plan.

The structure of Section 502(a)(3) indicates that the Court does have some latitude to determine what is appropriate equitable relief in addition to a mere injunction against further violations.

Money damages are frequently awarded by Courts as an element of equitable relief. Certainly, there's no more dramatic illustration of that than the relief granted under Title VII in which back pay, as a matter of routine, is granted in a circumstance of a discharge of a person in violation of that Act.

The language of many of the cases which hold that there may not be awarded any punitive damages or damages for emotional distress sometimes use the words "extra contractual damage" in indicating there is to be no extra contractual damage awarded under ERISA. It may be noted in this particular case that the damages of back pay really are not extra contractual.

They find that their meaning and definition in the contract, albeit one terminable at will, that existed between the plaintiff and the defendant in this case. The award of back pay is not an award for some unliquidated sum but, indeed, relates to the, and is governed by the, amount of money that was being provided under a contract [p. 29] that existed between the plaintiff and the defendant and which the Court has found would have continued in effect had not the plaintiff been improperly induced to abandon that contract.

This particular case may not have as broad implications for other areas of ERISA as might appear on the surface. This case is a peculiar one in that it is brought

against the defendant company, rather than against the Plan.

And the liability of the company here arises, so the Court has found, because the company essentially voluntarily assumed certain fiduciary responsibilities and duties that it might not and presumably would not otherwise have had. So, this is not a case in which, for example, damages are being awarded against a Plan for any kind of back pay. It is being awarded against the employer itself.

It is unnecessary for the Court to determine whether this same type ruling could apply in a situation in which an ERISA action was being brought against a Plan.

There is a very recent Eleventh Circuit case, Kane, K-A-N-E, versus Aetna Life Insurance, decided February 7, 1990, that has some significance. In that case, the Eleventh Circuit concluded that the Courts have authority to establish a body of federal common law to [p. 30] govern issues in ERISA actions not covered by the Act itself. The particular issues there related to ones of equitable estoppel and counsel may wish to look at the opinion. I'm not suggesting that the case is on all fours with this. But is does indicate that there is an area for the Court and, indeed, a responsibility for the Court to develop certain common law principles in areas in which the statute itself fails to cover those.

There is an issue that has been raised about Mr. Barnes' failure to seek other employment. I conclude that he had the duty to mitigate his damages even though he didn't know he had been damaged back at the time.

Nevertheless, a reduction of damages or the amount of equitable relief, more properly stated, is a matter on which the burden rests with the defendant, so that although the plaintiff had the burden or the duty to mitigate, it was the responsibility of the defendant in this action to have presented evidence showing that had he sought such employment, that comparable employment would have been available so that he could have mitigated these damages.

The argument is made by the defendant that there are non monetary benefits obtained by retirement and no doubt this is true.

Perhaps in some extreme circumstance, the Court [p. 31] might take into account those non monetary benefits and might take into account the failure of a plaintiff to take any form of action for an undue period of time barring the equitable relief that he seeks.

In this case, Mr. Barnes was not guilty of any laches after learning of the misrepresented matter but promptly did bring action on which he has ultimately prevailed.

The non monetary benefits here are not ones that the Court, in the exercise of equitable discretion, believes should be used to reduce the back pay he would have received; that is, the pay he would have received had he not been improperly induced to retire.

Consistent with these conclusions of law and, to some degree with the factual determinations that I've made, the stipulation of facts indicates that Mr. Barnes is to be awarded judgment in the amount of $93,664.28. This is a figure that the parties agreed by a compromise.

It reflects the difference in benefits between the two earlier retirement plans together with the loss of pay during that period of time between the two plans, really.

Accordingly, the clerk will enter a judgment, at this time, in favor of Mr. Barnes against the defendant in the amount of $93,664.28. Costs are taxed against the defendant.

[p. 32] This, of course, also constitutes a final judgment, not only with respect to the claim made by Mr. Barnes against the defendant but, also, with respect to the claims made by the other plaintiffs against the defendant on which the Court earlier had found in favor of the defendants. Accordingly, all judgments now will become final and subject to appeal.

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ALABAMA SOUTHERN DIVISION

JAMES L. BARNES, Plaintiff,	)	CV 88-P-1463-S
-vs.-	)	ENTERED March 6 1990
ALABAMA GAS CORPORATION, Defendant.	)	

AMENDED CLERK'S COURT MINUTES

This action came on for trial on February 27, 1990, before the Court, the Honorable Sam C. Pointer, Jr., Chief United States District Judge, presiding. The issues having been duly tried,

It is ORDERED and ADJUDGED that pursuant to findings of fact and conclusions of law dictated into the record by the Court, judgment is entered in favor of the plaintiff, James L. Barnes, and against the defendant in the amount of $93,664.28. Pursuant to earlier findings of fact and conclusions of law the claims of the other plaintiffs are hereby dismissed. Costs taxed against the defendant.

DATE: March 6, 1990
Birmingham, Alabama
Court Reporter: Karla Odom

CHARLES T. CLIVER, CLERK
By: /s/ Abbey C. Miles
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7228

JAMES L. BARNES, JR.,

Plaintiff-Appellee,

LEONARD GREFSENG, ROY R. KIMBERLY, WILLIE H. LITTLE, ELLIOTT H. MOORE, LILLIAN NORTHINGTON, JOSEPH D. PATRICK, LELLWYN B. LACKEY,

Plaintiffs-Appellants,

versus

A.S. LACY, D.C. REYNOLDS, ENERGEN BENEFITS COMMITTEE, ENERGEN CORPORATION, ENERGEN RETIREMENT INCOME PLAN, G.C. KETCHAM, G.C. YOUNGBLOOD, J.A. MARTIN, R.J. PATZKE, W.C. SELF, ALABAMA GAS CORP., Alabama Gas Corporation,

Defendants-Appellees,
Appellants.

Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING

(May 9, 1991)

BEFORE: FAY and JOHNSON, Circuit Judges, and PECK*, Senior Circuit Judge

PER CURIAM:

The petition(s) for rehearing filed by Appellants Leonard Grefseng, Roy R. Kimberly, Willie H. Little, Elliott H. Moore, Lillian Northington, Joseph D. Patrick and Lellwyn B. Lackey is denied,

ENTERED FOR THE COURT:

/s/ Peter Fay
United States Circuit Judge

(3)

Supreme Court, U.S.
FILED
OCT 11 1991
OFFICE OF THE CLERK

No. 91-244

In The

Supreme Court of the United States

October Term, 1991

JAMES L. BARNES, JR., LEONARD GREFSENG, ROY R. KIMBERLY, LELLWYN B. LACKEY, WILLIE H. LITTLE, ELLIOTT H. MOORE, LILLIAN NORTHINGTON AND JOSEPH D. PATRICK,

Petitioners,

versus

A.S. LACY, D.C. REYNOLDS, ENERGEN BENEFITS COMMITTEE, ENERGEN CORPORATION, ENERGEN RETIREMENT INCOME PLAN, G.C. KETCHAM, G.C. YOUNGBLOOD, J.A. MARTIN, R.J. PATZKE, W.D. SELF AND ALABAMA GAS CORPORATION,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Court of Appeals correctly ruled as a matter of law that there is no breach of fiduciary duty where a company describes present plan terms to employees truthfully and with no intent to deceive?

II. Whether the Court of Appeals correctly ruled that the Company did not have an obligation to affirmatively tell employees the Company reserved the right to consider future offers of voluntary early retirement, when at the time the Company offered its first plan (VERO) in 1985, it had no intention of making a future similar offer?

III. Whether the Court of Appeals correctly held as a matter of law that plan participants have notice of the Company's reservation of the right to amend the Plan, when an express reservation of that right is contained in the Summary Plan Description provided to plan participants?

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STATEMENT OF THE CASE

A. Statement of Facts[1]

In November of 1985 Alabama Gas Corporation (hereinafter "Alagasco" or the "Company"), a subsidiary of Energen Corporation[2] announced the formation of a voluntary enhanced retirement package called Voluntary Early Retirement Opportunity ("VERO"). VERO was adopted to provide additional incentives for employees who were eligible to take early retirement to elect to do so. (District Court's Findings of Fact and Conclusions of Law ("FF/CL"), found in Petitioners' Appendix, at A-13).[3]

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[1] Because Respondents take issue with Petitioners' presentation of the facts of this case and allegations that the Court of Appeals made factual findings additional to those made by the District Court, Respondents set forth the "Statement of Facts" in order to preserve their right to contest Petitioners' version. *See* Sup. Ct. Rule 15.1.

[2] Pursuant to Sup. Ct. Rule 29.1, the following is a list of all subsidiary corporations of Energen Corporation:

Alabama Gas Corporation
Taurus Exploration, Inc.
Basin Pipeline Corp.
Alagasco Pipeline Company
American Heat Tech, Inc.
W & J Propane Gas, Inc.

Energen has no parent corporations. Alabama Gas Corporation, often referred to as Alagasco, has no subsidiaries. Prior to 1985, Energen Corporation was named Alagasco, Inc. For clarity, this brief refers to Energen Corporation and Alabama Gas Corporation as the "Company."

[3] Although Petitioners' recitation of facts implies the Company wanted a large number of employees to accept VERO, the District Court expressly found that the Company had no target

About eighty employees were eligible under the incentive program. Approximately fifty percent of those eligible elected to retire. (FF/CL, Petitioners' Appendix at A-13). Petitioners[4] (hereinafter referred to as "Plaintiffs") are eight of those eligible persons who elected VERO.

About two years after VERO was announced, in November of 1987, the Company announced another opportunity for enhanced early retirement, referred to as VRIP (Voluntary Retirement Incentive Program). VRIP was also a voluntary program, which provided various benefits that were greater than those obtained under VERO. (FF/CL, Petitioners' Appendix at A-14).[5]

Following the announcement of VRIP, Plaintiffs brought this action against the Company asserting,

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number in mind. (FF/CL, Petitioners' Appendix at A-15). Further, the Company's motivation in enacting VERO is irrelevant. An employer's actions and motives regarding the establishment, termination and design of a plan are not governed by ERISA's fiduciary standards, but are "settlor" functions made in its capacity as a non-fiduciary. "Labor Department Letter on Fiduciary Responsibility and Plan Terminations," *reprinted in* 13 BNA Pension Reporter 472 (1986); *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988); *Childers v. Northwest Airlines, Inc.*, 688 F. Supp. 1357, 1361 (D. Minn. 1988).

[4] James L. Barnes, Jr., Leonard Grefseng, Roy R. Kimberly, Willie H. Little, Elliott H. Moore, Lillian Northington, Joseph D. Patrick and Lellwyn B. Lackey; Lila F. Huey, who was also a plaintiff below, did not appeal.

[5] The District Court found that the goals and objectives of VERO and VRIP were different. VERO was prompted by the Company's need to reduce the managerial "head count" and was seen as an opportunity for general corporate restructuring in 1985, whereas VRIP was offered as a result of two intervening circumstances in 1987: 1) an unforeseen financially distressful situation for the Company; and 2) a change in accounting principles. (FF/CL, Petitioner's Appendix at A-15,21).

although they *voluntarily* and *without coercion* elected to take early retirement under VERO, they were induced to do so by misleading or ambiguous statements provided to them concerning that program, because VERO was characterized as a "one-time offer." (FF/CL, Petitioners' Appendix at A-13) (*See* notes 6-7, *infra*).

Contrary to the assertions in Plaintiffs' Petition (*see, e.g.*, Petition, p. i, iv), neither the District Court nor the Court of Appeals held that the Company's statements made to employees regarding VERO were "misleading" or "inaccurate." To the contrary, both courts found that Defendants provided Plaintiffs with accurate information at the time statements were made about VERO, and that the Company's intention was "to provide accurate and full information that the employees would need in order to make their own individual decisions." (FF/CL, Petitioners' Appendix at A-15,26; Appellate Opinion ("App"), Petitioners' Appendix at A-4). Moreover, the District Court found, and the Court of Appeals recognized, that when the Company decided to make VERO available in 1985, it did not contemplate or intend to make any further or later offers of early retirement. (FF/CL, Petitioners' Appendix at A-14-15; App, Petitioners' Appendix at A-4). The Company had never made this type of offer up to that point in time, (Testimony of Warren, R4-143-324; Testimony of Self, R3-144-2), and did not believe it would be able to make any such offers again on a cost-neutral basis. No such offers were anticipated in the future. (FF/CL, Petitioners' Appendix at A-15). However, a Summary Plan Description ("SPD") given to Plaintiffs prior to VERO expressly reserved the Company's right to amend the plan. (App, Petitioners' Appendix at A-8-9).

In the latter part of 1985, the Company prepared and distributed materials that communicated VERO's provisions to the employees. The Company also conducted meetings with employees. The District Court found the objective of those meetings was to announce the VERO program and give some assurance to employees that VERO was not part of any financial exigency on the part of the Company. VERO was to be purely a voluntary decision by those who would be eligible. (FF/CL, Petitioners' Appendix at A-16).

The District Court concluded the Company, in communicating information about VERO, intended to provide accurate and full information that the Plaintiffs would need in order to make their own individual decisions; "there was no intent to mislead." (FF/CL, Petitioners' Appendix at A-15). This finding was adopted on appeal by the Eleventh Circuit. (App, Petitioners' Appendix at A-2).

In both verbal and written communications, VERO was referred to as a "one-time offer."[6] By referring to VERO as a "one-time offer" in oral and written communications, the District Court found the Company intended to emphasize the necessity of eligible employees accepting

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[6] "Packages" of information consisting of the VERO communications materials and a cover letter were distributed to eligible employees. They generally outlined VERO with a comparison of data for each individual, reflecting their options between normal early retirement and VERO. (FF/CL, Petitioners' Appendix at A-16). The cover letter that accompanied the VERO communications materials refers to VERO as a "one-time offer."

VERO during the window period and no later.[7] The court found VERO was, in fact, a "one-time opportunity." (FF/CL, Petitioners' Appendix at A-18).

Plaintiffs, however, interpreted the "one-time offer" language to mean that another enhanced early retirement opportunity would not be made in the future, i.e. that the Company had foreclosed *any* possibility of offering a future similar early retirement program forever. (FF/CL, Petitioners' Appendix at A-14).[8]

By December 6, 1985, the closing date of VERO's window, Plaintiffs had accepted VERO. On December 19, 1985 the Energen Benefits Committee approved paying benefits to forty employees. On January 1, 1986, the forty employees who accepted retirement with VERO's enhanced benefits, including Plaintiffs, retired.

A year and a half later, in the summer of 1987, because of an unforeseen financially distressed situation, the Company announced its plan for VRIP. (FF/CL, Petitioners' Appendix at A-21). These proceedings followed.

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[7] The context of the cover letter in which the "one time offer" statement was made supports this intention:

> I would like to again emphasize that the program is completely voluntary. It is available for you if it best fits your personal situation. *Please keep in mind, however, that this is a one time offer. This opportunity will not be available after December 6*. (emphasis added).

(*See* Testimony of Self, R3-144-170-173; 183)

[8] At least one employee, however, did admit at trial that a Company representative informed him the "one-time offer" phrase was intended to mean he had to turn in his choice by the close of the window period. (Testimony of Little, R3-144-61).

B. Course Of Proceeding And Disposition In The Court Below

This action was filed in August 1988 by Plaintiffs, former employees of Alagasco, in the Circuit Court for Jefferson County, Alabama against Respondents. The case was removed to the United States District Court for the Northern District of Alabama, Southern Division on August 31, 1988.

Plaintiffs asserted they "retired in reliance upon a representation [by the Company that] an enhanced early retirement opportunity would be provided only on a one-time basis." (Third Amended Complaint, R1-49). Plaintiffs' suit is a result of an announcement in November of 1987 by the Company, two years after VERO was offered, of VRIP, another voluntary enhanced early retirement package.[9]

Plaintiffs alleged three claims: 1) breach of fiduciary duty through misrepresentation or through suppression of a material fact; 2) violation of ERISA, § 510, 29 U.S.C. § 1140 by constructive discharge through fraud; and 3) violation of the terms of the Energen Plan and Energen SPD. Plaintiffs sought an award reflecting the difference in benefits between VERO and VRIP, back pay, and declaratory and injunctive relief.

The matter was tried before the Honorable Samuel C. Pointer, Jr. on October 16 and 17, 1989. The trial was bifurcated with respect to liability and damages. The

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[9] The original complaint named only Alagasco as Defendant. The Third Amended Complaint added Energen Corporation, the Energen Corporation Retirement Income Plan, and the individual members of the Energen Benefits Committee, W.D. Self, R.J. Patzke, A.S. Lacy, J.A. Martin, G.C. Ketcham, D.C. Reynolds and G.C. Youngblood, as Defendants (hereinafter "Defendants" or the "Company").

District Court issued Findings of Facts and Conclusions of Law (found in Petitioners' Appendix at A-12) on October 17, 1989 with respect to liability. A separate hearing was held for damages on February 27, 1990. The issue of attorney's fees was reserved until after the appeal of this matter.

In its Findings of Fact and Conclusions of Law, the District Court found the Company and its representatives made no misleading statements regarding VERO. (FF/CL, Petitioners' Appendix at A-26). The court also found that the Company had no intent to mislead employees regarding whether there would be future similar offers of enhanced early retirement benefits at the time the Company announced and offered VERO in 1985. (FF/CL, Petitioners' Appendix at A-15).

The District Court rejected Plaintiffs' assertion that in November and December of 1985, when the Company indicated VERO was a "one time offer," the "Company might have contemplated or even intended to offer a later early retirement plan, such as VRIP." (FF/CL, Petitioners' Appendix at A-14-15). To the contrary the District Court concluded the testimony and numerous exhibits introduced at trial did not establish any future plan was intended and noted that Plaintiffs appeared to have abandoned that type of claim. (FF/CL, Petitioners' Appendix at A-15). "The evidence is clear that *at the time in late 1985 when the Company had decided to make VERO available* it did not anticipate there would be any further or later offers of early retirement." (FF/CL, Petitioners' Appendix at A-15) (emphasis added). The court specifically found the Company "believed that it would be unable to make any such offers on a cost-neutral basis, and that no such offers were, indeed, anticipated." (FF/CL, Petitioners' Appendix at A-15). The District Court found:

> [t]o the extent there was any charge in this litigation initially that there was any intentional misleading of employees, the Court finds favorably to the Defendant. The Court finds there was *no intent to mislead.* There was, indeed, an intent on the part of the Company to provide *accurate and full information* that the employees would need in order to make their own individual decisions.

(FF/CL, Petitioners' Appendix at A-15) (emphasis added).

The trial court found it was the Company's intent, when describing VERO as a "one-time offer," to emphasize the program had to be accepted or rejected within the window before December 6. (FF/CL, Petitioners' Appendix at A-14-15). The court believed, however, that Plaintiffs misunderstood the "one-time offer" to mean the Company had foreclosed *any* possibility of offering a future similar early retirement program *forever*. The court concluded the statements made by the Company were "not in and of themselves necessarily misleading, just subject to being misunderstood." (FF/CL, Petitioners' Appendix at A-26). Despite specific findings that the Company made no misleading statements and intended to provide a full and fair disclosure to Plaintiffs, the District Court held Defendants liable for misrepresentation under ERISA on the basis *the Plaintiffs misunderstood* what the Company told them. (FF/CL, Petitioners' Appendix at A-20,26).

The District Court held the Company responsible for statements it did not make, but in the court's opinion (in hindsight), should have made to employees. The District Court did not hold that the Company should have told Plaintiffs about VRIP, nor did the court hold that the

Company should have informed Plaintiffs that the Company reserved the right to make a *more favorable* special early retirement offer in the future. Rather, the court concluded the Company should have informed its employees that it reserved the right to consider making future similar offers of whatever nature. (FF/CL, Petitioners' Appendix at A-18). As the Court of Appeals noted, however, this information was contained in the SPD given to Plaintiffs.[10]

The court awarded damages in favor of Plaintiff James Barnes only,[11] concluding only Barnes relied on the misinterpretations to his detriment.[12]

Both parties cross-appealed to the United States Eleventh Circuit Court of Appeals. In its written opinion, (found in Petitioner's Appendix at A-1), the Court of

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[10] Because the District Court found the Company did not to intend to mislead the employees, but in fact intended to give full disclosure, Plaintiffs failed to prove fraud necessary for liability for constructive discharge under § 510 of ERISA, 29 U.S.C. § 1140. (FF/CL, Petitioners' Appendix at A-15).

[11] In the separate hearing on damages, the court awarded Barnes $93,664.28, reflecting the difference in benefits between VERO and VRIP, and two years' back pay. (FF/CL, Petitioners' Appendix at A-32-33).

[12] The District Court determined in order to receive the benefits they sought in the litigation, Plaintiffs had to establish they relied on some misinformation or omission, and would not have elected VERO had they been given that information. (FF/CL, Petitioners' Appendix at A-14). Because the Court of Appeals determined Defendants did not breach their fiduciary duties, it did not reach the issue of whether Plaintiffs must prove reliance. Therefore, whether proof of reliance is necessary was not an issue considered by the Court of Appeals and is not ripe for review by this Court, although Plaintiffs attempt to raise it in their Petition. *See, e.g., IBEW, AFL-CIO v. Hechler,* 481 U.S. 851, 865, 107 S.Ct. 2161, 2170 (1987).

Appeals expressly and unanimously adopted the District Court's findings of fact and referred to evidence admitted at trial that appeared in the record, but as a matter of law reversed the court's holding that the Company breached a fiduciary duty under ERISA by failing to reiterate its reservation of the right to amend the plan. (App, Petitioners' Appendix at A-2).

The Eleventh Circuit concluded that "Alagasco had told its employees the truth about VERO." (App, Petitioners' Appendix at A-8). The Court of Appeals adopted and cited to the District Court's findings of fact in reaching this conclusion:

> Alagasco had no intent to mislead the employees regarding whether any future offers would be made following the VERO offer. The evidence clearly established that, at the time Alagasco made VERO available to its employees, "it did not contemplate making any further or later offers of retirement." (R5-4). Alagasco's comments regarding VERO being a "one-time offer" were not in and of themselves misleading.

(App, Petitioners' Appendix at A-8).

The Court of Appeals then noted the legal error of the District Court:

> Despite these factual findings, the court held that Alagasco was, as a fiduciary under ERISA, liable for misrepresentation. The court found that Alagasco had committed a misrepresentation on the basis that the company's statements were subject to being misunderstood by employees.

(App, Petitioners' Appendix at A-8).

The Court of Appeals further held that, since each employee received an SPD[13] containing a reservation of the right to amend the plan, as a matter of law the employees had constructive notice of the very fact which they claim the employer should have told them – that the plan could be changed in the future. Therefore, even if the Company had a duty to inform Plaintiffs of the right to amend, the Eleventh Circuit, reversing the District Court as a matter of law, held the Company fulfilled this duty by providing the SPD. (App, Petitioners' Appendix at A-8-9). The Court of Appeals also rejected the District Court's creation of additional notice requirements under ERISA (App, Petitioners' Appendix at A-9).

The Court of Appeals alternatively held that a fiduciary cannot be liable for making a good faith, truthful statement *solely* because the statement might be subject to misunderstanding.[14] The court held that such a statement was not a "misrepresentation." To place such a burden on plan fiduciaries would be inequitable. Therefore, Defendants were not liable for misrepresentation for labelling VERO a "one-time offer." (App, Petitioners' Appendix at A-9-11).

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[13] The Summary Plan Description was introduced and admitted as Defendants' Exhibit 27 at trial and was part of the record on appeal. The Court of Appeals, therefore, properly considered it in making its determination. *See* note 26, *infra*.

[14] Plaintiffs' claims are based on the false premise that an employer has a fiduciary duty to employees regarding future plans not in effect. The Court of Appeals did not have to reach this issue because it determined that, even assuming Defendants had a fiduciary duty, they did not breach it. Defendants wish to preserve their argument, made both in the District Court and the Eleventh Circuit, that an employer's actions prior to the establishment of a plan are settlor functions. *See* note 3, *supra*.

SUMMARY OF ARGUMENT

The Court of Appeals' ruling that the SPD gave Plaintiffs notice of the Company's reservation of the right to amend is amply supported by the record and by existing law. Further, the Eleventh Circuit's alternative holding that Defendants did not breach any fiduciary duty is also correct as a matter of law. There is no duty under ERISA to disclose information regarding a future plan not in effect.

This case does not involve a conflict among the circuits. The ERISA cases cited by Plaintiffs are factually and legally distinguishable from the case at bar.

The Court of Appeals did not make any additional factual findings to those made by the District Court. Rather, the Eleventh Circuit adopted the factual findings of the District Court and relied on the record in reversing the District Court as a matter of law.

Finally, federal securities laws should not be used to supplement ERISA's reporting and disclosure requirements. ERISA's provisions should only be supplemented where ERISA does not address the issue. ERISA has express reporting and disclosure requirements that are exclusive. Additionally, this Court expressly rejected the application of federal securities laws to ERISA pension plans in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 99 S.Ct. 790 (1979).

REASONS FOR DENYING PETITION

A. The Court of Appeals Correctly Decided this Case Based on the Facts Found by the District Court

The Court of Appeals' two alternative holdings in the instant case are legally correct, and thus, no review is

required. The court first held that, since all of the plaintiffs were given an SPD, they had notice of the SPD's provisions. This holding is consistent with those of other circuit courts.[15]

Plaintiffs apparently argue that even though an employer has revealed its reservation of the right to amend through an official plan document given to participants, it nonetheless has an *additional* duty to reiterate this reservation of rights every time it presents benefits to employees.[16] ERISA's reporting requirements do not

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[15] *See, e.g., Schultz v. Metropolitan Life Insurance Co.*, 872 F.2d 676 (5th Cir. 1989) (Employee who received copy of plan summary is "charged with knowledge of the plan" and cannot claim breach of fiduciary duty for company's failure to remind him of SPD provision); *Cummings v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 387 (7th Cir.), *cert. denied*, 479 U.S. 1008, 107 S.Ct. 648 (1986) (Plan administrators who provided participant with complete and accurate SPD did not violate fiduciary duty by failing to seek out individual participant and inform him of his rights under plan); *Arnold v. Arrow Transportation Co. of Delaware*, 926 F.2d 782, 786 (9th Cir. 1991) (Company fulfilled duty to disclose its limitation of liability under plan by providing SPD which clearly states this limitation, *even if participant did not read SPD*).

[16] Plaintiffs alleged below that certain written statements concerning VERO were "summary plan descriptions." Plaintiffs have not made that assertion in their Petition for Writ of Certiorari, and so the Supreme Court should not consider this argument. *Weinberger v. Rossi*, 456 U.S. 25, 36 n.18, 102 S.Ct. 1510, 1518 n.18 (1982). In any event, a letter to employees briefly outlining an amendment to the plan is clearly not an SPD. *See, e.g., Alday v. Container Corp. of America*, 906 F.2d 660, 665-66 (1990), *cert. denied*, 111 S.Ct. 675 (11th Cir. 1991) (where an official SPD has been provided to employees, an employer's subsequent communications to participants regarding benefits are not plan documents); *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1316-17 (3d Cir.), *cert. denied*, 111 S.Ct. 2856 (1991)

require such repetitious disclosure by plan sponsors. *See* 29 U.S.C. § 1021, et seq. If the courts were to create such a duty to reiterate (which would conflict with ERISA, 29 U.S.C. § 1024, regarding when notices must be given), how often would an employer be required to make this statement before it risks losing the right – monthly? daily? Must the employer recite the entire plan or risk being held liable for an "omission"?

ERISA details the obligations of employers and administrators regarding reporting and disclosure. *See* 29 U.S.C. § 1021, et seq. The Eleventh Circuit's holding is consistent with the congressional intent of providing certainty to employers and administrators regarding disclosures under ERISA. *C.f. Ingersoll-Rand Co. v. McClendon,* 111 S.Ct. 478, 484 (1990); *Fort Halifax Packing Co., Inc. v. Coyne,* 482 U.S. 1, 9, 107 S.Ct. 2211, 2216 (1987).[17] Plaintiffs' interpretation of ERISA would wreak

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(where overview brochure lacked virtually all categories required by ERISA for SPD, and where another document called SPD exists which fulfills these requirements, overview brochure is not SPD)

[17] "It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement"

Ingersoll-Rand, 111 S.Ct. at 484. Similarly, if federal courts are free to create additional disclosure requirements, these may vary from court to court and jurisdiction to jurisdiction. "Such a situation would produce considerable inefficiencies, which the employer might choose to offset by lower benefit levels." *Fort Halifax,* 482 U.S. at 10, 107 S.Ct. at 2217. Additionally, only *after* the fiduciary had already acted would he learn from the courts

havoc on the carefully integrated notice provisions created by Congress.

The Eleventh Circuit's alternative holding that the Company cannot be liable for misrepresentation when it disclosed in good faith the information which it possessed at the time it announced VERO, is also correct as a matter of law. ERISA specifically permits an employer to amend, alter or terminate benefits and plans without consideration of the employees' interest so long as participants' accrued or vested benefits are protected. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893 (1987) and cases cited therein; *Young v. Standard Oil*, 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 980, 109 S.Ct. 529 (1988). There is no duty under ERISA to disclose information regarding a plan not in effect. *Trexel v. E.I. DuPont de Nemours & Co.*, 1987 U.S. Dist. LEXIS 13,973 (D. Del. 1987)(set forth in Appendix B), *aff'd*, 845 F.2d 1016 (3d Cir. 1988) (table); *citing Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *Sleichter v. Monsanto Co.*, 612 F. Supp 856, 859 (E.D. Mo. 1985). Therefore, it follows ERISA does not obligate the Company to divulge information regarding a future offer which is not even being considered. *Id.*; *see also Payonk v. HMW Ind. Inc.*, 883 F.2d 221, 229 (3d Cir. 1989); *Porto v. Armco, Inc.*, 825 F.2d 1274, 1276 (8th Cir. 1987), *cert. denied*, 485 U.S. 937, 108 S.Ct. 1114 (1988). There is no "duty of clairvoyance" imposed by ERISA. *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988).

The District Court held the Company accountable for the employees' interpretation of its statements at the time VERO was offered, in effect making the Company the

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whether he failed to comply with some hidden requirement not set forth in the statute.

insurer of each participant's understanding. (*See* FF/CL, Petitioners' Appendix at A-18, 26). The Eleventh Circuit correctly refused to make the Company an insurer of participants' understanding as to future events and refused to impose hindsight requirements. (App, Petitioners' Appendix at A-9-11). If the District Court's rule were applied, the effect on plans and their fiduciaries and sponsors would be absurd. For example, the Company in the instant case did not offer another early retirement plan until two years after VERO, and only then after future unforeseen changes in circumstances. If the Company were held liable for Plaintiffs' mistaken belief that no new special early retirement offers would be made in the future, how long would it be bound by that misunderstanding – for ten years? twenty? forever? ERISA contemplates that employers must have the flexibility to respond to changing financial needs without being bound by "promises" they did not make or intend.

B. Plaintiffs' Petition Does Not Present Any of the Requisite Factors Which the Court Considers in Granting a Petition for Writ of Certiorari

The Supreme Court grants a Petition for Writ of Certiorari when the case presents special or important reasons for granting of the writ. Sup. Ct. Rule 10. None of the considerations that weigh in favor of granting a writ petition are present in the instant case: 1) despite Plaintiffs' assertions, no conflict between the circuits was created by the Eleventh Circuit's opinion; 2) the Eleventh Circuit has not departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by a lower court; and 3) nothing in this case

presents an important, new decision of federal law meriting Supreme Court review.[18] To the contrary, this case involved a straightforward application of ERISA to a narrow fact pattern.

1. The Decision of the Court of Appeals Does Not Conflict with Decisions of Other Courts of Appeals

Plaintiffs argue the Eleventh Circuit's opinion conflicts with the Sixth and D.C. Circuit opinions of *Eddy v. Colonial Life Ins. Co. of America,* 919 F.2d 747 (D.C. Cir. 1990) and *Berlin v. Michigan Bell Telephone Co.,* 858 F.2d 1154 (6th Cir. 1988). Additionally, while Plaintiffs state the Eleventh Circuit's decision conflicts with *Rosen v. Hotel & Restaurant Employees & Bartenders Union,* 637 F.2d 592 (3d Cir.), *cert. denied,* 454 U.S. 898, 102 S.Ct. 398 (1981), they fail to state how the two opinions conflict. These cases are all factually and legally distinguishable from the case at bar and thus do not raise a conflict warranting the grant of a petition for writ of certiorari.

Eddy v. Colonial Life Ins. Co., supra, is inapposite, because it concerned information regarding a plan

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[18] Plaintiffs also appear to argue that certain factual findings of the District Court are erroneous, such as the court's finding of no reliance by most Plaintiffs and the finding of no intent to mislead on the part of the Company. However, these allegations do not provide a reason for granting the petition. The Supreme Court accords great weight to findings of fact which have been made by the district court and approved by the court of appeals. *NCAA v. Board of Regents of Univ. of Okla.,* 468 U.S. 85, 98 n.15, 104 S.Ct. 2948, 2958 n.15 (1984), *citing Rogers v. Lodge,* 458 U.S. 613, 623, 102 S.Ct. 3272, 3278 (1982). Absent exceptional circumstances, the Court will not even review such findings to determine if they are clearly erroneous. *Branti v. Finkel,* 445 U.S. 507, 512 n.6, 100 S.Ct. 1287, 1291 n.6 (1980).

already in existence, not a future plan. In the instant case, when the Company gave employees information regarding VERO, the VRIP plan was not yet in existence, let alone contemplated, and thus, no fiduciary liabilities had attached. *See, e.g., Landry v. Air Line Pilots Association*, 901 F.2d 404, 414 (5th Cir.), *modified in part on other grounds*, 901 F.2d 437, *cert. denied*, 111 S.Ct. 244 (1990) (ERISA's fiduciary duties apply "only to established 'plans'.").

Further, *Eddy* is inapplicable because the Company in the instant case did not conceal information in its possession from the employees. The *Eddy* court stated:

> A fiduciary has a duty not only to inform a beneficiary of *new* and relevant information *as it arises*, but also to advise him of circumstances that threaten interests relevant to the relationship. For example, a fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer – such as the failure of an employer to contribute to the fund as required.

Id. at 750 (citations omitted). A trustee is required to communicate " 'all material facts in connection with the transaction which the trustee *knows or should know*.' " *Id.* at 751, *quoting* Restatement (Second) of Trusts § 173, comment d (1959).[19]

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[19] *Eddy* is also distinguishable because it deals with the duties of a fiduciary who is contacted by a single plan participant with questions regarding specific terms of the plan that were not explained in the SPD, rather than as in the instant case where the employer was communicating to employees in a group. *Eddy*, 919 F.2d at 752 ("Once Eddy *indicated his predicament* to Chubb representatives, Chubb bore a fiduciary duty under ERISA to convey to Eddy complete and correct material information as to his status and his conversion options.") (emphasis added). ERISA's notice and disclosure requirements govern that duty. *See* 29 U.S.C. § 1021, et seq. Defendants com-

In any event, the Company in this case clearly complied with the standard set forth in *Eddy*.[20]

Plaintiffs complain they were not told that the Company could offer a plan at a later date. The SPD clearly reserves this right. The information was not "new" at the time VERO was discussed with the employees, so there was no need to disclose it under the *Eddy* standard.

Further, the Company under *Eddy* would not be required to tell participants about VRIP, since at the time it was explaining VERO, the Company did not know and could not have known that VRIP would be implemented in the future. (FF/CL, Petitioners' Appendix at A-15,21). Thus, there is no conflict with *Eddy*.

Berlin v. Michigan Bell, supra, is likewise distinguishable from the instant suit.[21] The Eleventh Circuit

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plied with those requirements by providing the SPD to plan participants.

[20] Respondents submit that the *Eddy* case is wrongly decided, because the D.C. Circuit created notice requirements additional to those set forth in ERISA. The notice requirements of ERISA must be the exclusive notice requirements; otherwise plan fiduciaries would have no way of knowing whether they were complying with ERISA or not. *See, e.g., Childers v. Northwest Airlines, Inc.,* 688 F. Supp. 1357, 1361-62 (D. Minn. 1988) (ERISA's detailed and uniform disclosure requirements are the only disclosure requirements, and courts would create an "impossible burden" if they required additional, non-statutory disclosures by plan entities). The common law of trusts should only be used to fill in the gaps of ERISA (*see e.g., Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 109 S.Ct. 948, 954 (1989)), not to amend the existing notice requirements. However, the instant case does not create a conflict with *Eddy*, because the Circuit Court's holding shows Respondents satisfied even the expanded notice requirements in *Eddy*.

[21] Although Defendants have always asserted and continue to assert that *Berlin* is wrongly decided, the Eleventh Circuit's

expressly held that this case was consistent with, albeit factually distinguishable from *Berlin*. Because the Eleventh Circuit held that Defendants met the standard set forth in *Berlin*, there is no conflict.

> We fail to see how a fiduciary could be held liable for making a good faith, truthful statement solely because the statement might be subject to misunderstanding. The district court, in so holding, placed an unreasonable burden upon Alagasco to predict future, unintended events. To impose such a duty is inequitable. *See Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1164 (6th Cir. 1988). Alagasco could only be liable for such a predictive statement if it were a "material misrepresentation." *See id.* If, for example, Alagasco, "after *serious consideration* of a second [VERO] represented that [a later VERO offering] was not being considered or used words to that effect, such a representation would be characterized as a material misrepresentation, although no final decision had been made." *Id.* at 1164 n.7 (emphasis in original). *In the case before us, Alagasco never considered that a later offer would be made when it stated that VERO was a one time offer. Therefore we find that Alagasco made no material misrepresentation.*

(App, Petitioners' Appendix at A-10-11).[22]

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opinion does not create a conflict with the erroneous portions of *Berlin*.

[22] Plaintiffs' attempts to mischaracterize *Berlin* are without substance. (*See* Petitioners' Brief at 17-18 n.4) It is never "fair" to expect a plan fiduciary to disclose that which it does not and cannot know. Defendants could not have informed Plaintiffs about VRIP, since the Company did not plan to offer a future special early retirement offer, and in fact believed such a future offer to be impossible. *Berlin* does not require such disclosure. Even if Plaintiffs believe such disclosure should be required, however, since no other circuit court has yet required it, there is

Plaintiffs make no effort to show how the Eleventh Circuit's opinion conflicts with the Third Circuit's opinion in *Rosen*. *Rosen* is clearly inapplicable, for its sole holding was that an administrator has a duty to disclose the fact that the employer failed to make required plan contributions.[23]

Plaintiffs also allege that the opinions of the Eleventh Circuit and the District Court regarding the need for proof of reliance conflict with the Sixth Circuit's opinion in *Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134 (6th Cir. 1988). In *Edwards*, the Sixth Circuit, in *dictum* stated that plan participants need not prove reliance on a statement *in an SPD that conflicted with the actual plan language.*[24] The District Court in the instant case held, in

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no conflict among the circuits on this issue. As for the reservation of the right to amend the plan in the future, the Company had already disclosed that information, as a matter of law and pursuant to ERISA's requirements, via the SPD.

[23] *Rosen* was not even an ERISA case, but was decided under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, *Rosen*, 637 F.2d at 596 & n.5, although some ERISA concepts were applied. The holding in *Rosen* was a narrow one – that a fiduciary has the duty to inform plan participants that the employer has failed to make required contributions to the plan. Further, the fiduciaries had a duty to take action against the employer for failing to contribute to the plan. *Id.* at 599-600. These holdings do not conflict with that of the Eleventh Circuit in the instant case.

[24] There was no conflict between the SPD and the Plan, nor was there a conflict between the Company's discussion of VERO and the SPD. The Eleventh Circuit has expressly held that where the SPD contains a reservation of the right to amend, a failure to reiterate that reservation in subsequent communications with participants is not a contradiction of the SPD. *Alday v. Container Corp. of America*, 906 F.2d 660, 666 n.15. (11th Cir. 1990), *cert. denied*, 111 S.Ct. 964 (1991). No conflict among the circuits exists on this issue.

order to recover damages, Plaintiffs had to prove they relied on their "misunderstanding" of Defendants' statements and show that they would not have taken VERO if they had understood the truth. The Eleventh Circuit, however, did not reach the issue of reliance. The court held there were no misstatements or omissions, and therefore it was not required to reach the issue of reliance. Since the issue was not even discussed by the Eleventh Circuit, its opinion could not possibly conflict with *Edwards*. The issue is not ripe for review. *See* note 12, *supra*.[25]

Plaintiffs also allege the Eleventh Circuit's holding that the Company's good faith, truthful statement was not a breach of fiduciary duty conflicts with the decision of the Seventh Circuit in *Leigh v. Engle*, 727 F.2d 113 (7th Cir. 1984). *Leigh* is neither factually nor legally similar to the instant suit. The issue in that case was whether the subjective good faith of a trustee managing plan assets was relevant in determining liability for violations of ERISA's prohibited transaction provision, 29 U.S.C. § 1106.

In *Leigh*, plan fiduciaries invested plan assets in companies involved in highly speculative takeover contests

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[25] Even if Plaintiffs are permitted to raise this issue, however, the *Edwards* case is factually and legally distinguishable from the instant case. In *Edwards*, the court held that an employee who received an SPD containing a provision expressly contrary to that of the Plan document reasonably relied on the SPD, and the terms of the SPD controlled over the provisions of the Plan. *Edwards*, 851 F.2d at 136-37. The court in *dictum* stated that proof of reliance on the misstatement in the SPD is not required. *Id.* at 137. In the instant case the SPD and the Plan both contained an express reservation of the right to amend and thus are not conflicting. (*See* Def. Exhibit 22, Article 8.1; Def. Exhibit 27, p.26).

after investing their personal funds in those corporations. *Id.* at 116. Specific ERISA statutes prohibit *per se* the use of plan assets for the benefit of a fiduciary or third parties (*see* 29 U.S.C. §§ 1104, 1106) and subjective good faith is irrelevant in deciding whether these statutory requirements have been breached. *Id.* at 124. The instant case, however, involves claims of misrepresentation, and the good faith belief by the speaker is clearly relevant. A misrepresentation is a statement made with knowledge that it is false or with reckless disregard as to its truth or falsity, with an intent to induce reliance. Prosser & Keaton, *Torts* § 105, p. 728; § 107, p. 740-41 (5th ed. 1984). A good faith belief in the truth of the statement is, therefore, key to the issue of liability.

2. The Eleventh Circuit Did Not Make Any Findings of Fact Additional And/Or Contrary to Those Found by the Trial Court

Plaintiffs assert that the Court of Appeals made several "findings of fact" additional and/or contrary to those made by the District Court, specifically 1) that Alagasco "told the truth about VERO" and "made no untruthful statements" and 2) that the participants had constructive notice of the contents of the SPD.

The Eleventh Circuit made no new factual findings. Rather, the Court of Appeals adopted the findings of fact of the District Court and reviewed the record of the case,[26] and reversed the District Court as a matter of law.

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[26] Plaintiffs appear to argue that the Eleventh Circuit did not have the right to examine all of the admitted exhibits in the record and base its opinion on those exhibits. A court of appeals is clearly entitled, indeed has a duty to review the record of the case, and is not limited to the evidence cited by the district court

a. Alagasco told the truth

The Court of Appeals did not find facts contrary to the District Court when concluding that "Alagasco had told its employees the truth about VERO." (App, Petitioners' Appendix at A-8). The only possible conclusion that can be drawn from the District Court's findings is that Defendants' description of VERO as a one-time offer was an accurate and objective statement of the facts as they existed at the time the statement was made, with no intent to mislead. In other words, "the truth."[27] The Court of Appeals' statement that the District Court found Defendants told the truth is simply the Eleventh Circuit's summary of the findings in the trial court.

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in its opinion. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473-74, 98 S.Ct. 2454, 2460 (1978) ("The district court must take the evidence, entertain argument, and make findings, and the court of appeals must review the record and those findings . . . "); *DeBruyne v. Equitable Life Assurance Society of U.S.*, 920 F.2d 457, 463-64 & n.10 (7th Cir. 1990) (court of appeals may affirm on any ground supported by the record). If the district court fails to consider the issue below, and hence makes no factual findings, where the record permits only one resolution of the issue, the court of appeals may rule on the issue and is not required to remand. *Pullman-Standard v. Swint*, 456 U.S. 273, 292, 102 S.Ct. 1781, 1792 (1982); *FDIC v. Kasal*, 913 F.2d 487, 493 (8th Cir. 1990). The Court of Appeals correctly ruled that the only possible resolution of the issue (whether Plaintiffs were told that the Company reserved the right to amend the Plan) was a determination that the Company provided such information. The SPD unambiguously revealed the reservation of right and so, as a matter of law, Plaintiffs had notice.

[27] Webster's Dictionary defines "truth" as follows: "1. a being true; specif., a) sincerity; honesty b) conformity with fact c) reality; actual existence d) correctness; accuracy 2. that which is true 3. an established fact . . . "

Plaintiffs allege that statements by the Company that VERO was a "one-time opportunity" violated ERISA because, two years later VRIP, a different (more favorable) plan, was offered. The fact remains, however, that the District Court found that, in describing VERO as a "one-time offer," no future plan was intended or contemplated by the Company *at that time,* and that VERO was in fact intended as a "one-time opportunity." (FF/CL, Petitioners' Appendix at A-14-15). The District Court further found that the Company, at the time it offered VERO, "believed that it would be unable to make any such [future] offers on a cost-neutral basis, and that no such offers were, indeed, anticipated." (FF/CL, Petitioners' Appendix at A-15).

The District Court found the Company intended to provide accurate and full information:

> To the extent there was any charge in this litigation initially that there was any intentional misleading of employees, the Court finds favorably to the defendant. The Court finds there was no intent to mislead. There was, indeed, an intent on the part of the company to provide *accurate and full information* that the employees would need in order to make their own individual decisions.

(FF/CL, Petitioners' Appendix at A-15) (emphasis added).

The Court of Appeals adopted these findings; the court also held that Defendants did not fail to tell Plaintiffs about the reservation of the right to amend, even if there was such a duty, since the SPD as a matter of law gave Plaintiffs constructive notice of that fact. Therefore, the Company gave a full, truthful disclosure as a matter of fact and law.

b. The SPD Provided Notice of the Company's Right to Amend the Plan

The Eleventh Circuit's reliance on the SPD is appropriate to support its alternate holding that the Company provided employees with notice of the right to amend the Plan via the SPD. *See* note 26, *supra*. The SPD was admitted into evidence by the District Court (Defendants Exhibit 27) and was thus part of the record on appeal. Plaintiffs do not contend they did not receive the SPD. Thus, the Court of Appeals' conclusion that Plaintiffs were notified of this reservation is simply a straightforward conclusion reached from undisputed facts. (*See also* Part A., *supra*).

3. Whether Securities Laws Should Be Used to Supplement ERISA Is Not an Important Issue of Federal Law and Does Not Create a Conflict in the Circuits.

As noted above, the Eleventh Circuit did not reach the issue of reliance, and so did not reach the issue of whether reliance principles should be borrowed from federal securities act case law. Thus, the issue is not ripe for review by this Court. *See* note 12, *supra*. Even if the Court should reach this issue, however, it should reject this argument as a reason to grant the Petition for Writ of Certiorari. Contrary to Petitioners' assertions, ERISA's reporting and disclosure requirements do not contain a "void" that would need to be filled by borrowing from other statutes. Rather, these regulations reflect a balancing of interests by Congress that should not be disturbed by the courts.[28]

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[28] The Eleventh Circuit implicitly recognized the exclusivity of ERISA's reporting and disclosure provisions when it

Plaintiffs assert that the Court of Appeals' refusal to "borrow" a presumption of reliance from case law interpreting federal securities laws creates a conflict in the circuits. Nowhere, however, do Plaintiffs point to an appellate case where a circuit court approved or rejected such analysis. There is no conflict among the circuits on this issue.

Plaintiffs also allege that the issue of whether or not to borrow securities law analysis is an important and undecided issue of federal law. Plaintiffs cannot create an "important" and "unsettled" question of federal law by going completely out into left field.

Plaintiffs assert that federal securities laws should be used to "supplement" ERISA's reporting and disclosure requirements. The only case cited by Plaintiffs for this proposition is *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948 (1989). Plaintiffs reliance on *Bruch* is misguided. In fact, *Bruch* counsels against such an extension of securities law principles. In *Bruch*, this Court noted that ERISA is a "comprehensive and reticulated statute." 109 S.Ct. at 953, *quoting Nachman Corp. v. PBGC*, 446 U.S. 359, 361, 100 S.Ct. 1723, 1726 (1980). Only where ERISA does not *expressly* provide guidance did Congress, as shown by the legislative history of ERISA, intend that the common law of trusts (not securities) should be used to fill in the gaps of ERISA. 109 S.Ct. at 954.[29] There are

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disapproved of the District Court's creation of additional notice requirements. (App, Petitioners' Appendix at A-9).

[29] In *Bruch*, the Supreme Court noted that nowhere does ERISA provide a standard for reviewing a plan administrator's or trustee's interpretation of the plan. The Court observed that the legislative history of ERISA showed Congress intended courts to borrow from the common law of trusts to fill in the

no gaps in ERISA regarding reporting and disclosure requirements. Rather, ERISA contains *express* provisions governing reporting and disclosure. *See* 29 U.S.C. § 1021, et seq. Congress chose these specific requirements and by inference rejected any others. *Cf. Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556 (1987).[30]

Additionally, Plaintiffs have failed to cite any legislative history demonstrating a congressional intent to fill in gaps in ERISA with federal securities law. In fact, this Court has already rejected attempts to apply securities law requirements to pension plans. In *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 99 S.Ct. 790 (1979) the Court, in a case regarding whether the Securities Exchange Act of 1934 should be applied to pension plans, held that compulsory, noncontributory pension plans were not covered by Section 10(b) of the 1934 Act, 15 U.S.C. § 78(j) and Rule 10b-5, 17 C.F.R. § 240.10b-5.[31] The Court held that ERISA's extensive regulation of the substance of pension plans, *coupled with its detailed reporting requirements*, when contrasted with the indefinite obligations under the Securities Act of 1934, demonstrates

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gaps in ERISA. *Bruch*, 109 S.Ct. at 953-54. The Court thus borrowed a standard of reviewing decisions of trustees under trust law.

[30] " 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.' " *Pilot Life*, 481 U.S. at 54, 107 S.Ct. at 1556, *quoting Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146, 105 S.Ct. 3085, 3092 (1985) (emphasis in original).

[31] In other contexts, the Fifth Circuit has also cautioned against expanding the reach of Rule 10b-5, especially where other federal laws already regulate that area. *See, e.g., Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 92 (5th Cir. 1975).

that ERISA should be the exclusive governing statute for pension plans and that the federal Securities Acts should not apply. *Daniel,* 439 U.S. at 569-70, 99 S.Ct. at 802.

> The existence of this comprehensive legislation governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pension plans. Congress believed that it was filling a void when it enacted ERISA. . . . *Not only is the extension of the Securities Acts by the court below unsupported by the language and history of those Acts, but in light of ERISA it serves no general purpose.* . . . Whatever benefits employees might derive from the effect of the Securities Acts are now provided in more definite form through ERISA.

Daniel, 439 U.S. at 569-70, 99 S.Ct. at 801-02 (emphasis added). The same detailed regulations and reporting requirements discussed in *Daniel* applied to VERO. The applicability of federal securities laws to ERISA pension plans has already been definitively decided by this Court and the Court of Appeals' refusal to borrow from securities law does not merit review.

Further, the securities case relied upon by Plaintiffs, *Affiliated Ute Citizens of Utah v. United States,* 406 U.S. 128, 92 S.Ct. 1456 (1972), deals with a situation not analogous to the one presented here. The Court in *Affiliated Ute* held that because federal securities laws *expressly* require disclosure of all material facts, plaintiff investors were not required to prove detrimental reliance on a failure to disclose such material facts. 406 U.S. at 152-55, 92 S.Ct. at 1470-72. ERISA, however, contains no such requirement.[32]

[32] Plaintiffs assert that ERISA also expressly requires disclosure of all material facts, but the only source of that alleged

Congress enacted specific disclosure requirements under ERISA, *see* 29 U.S.C. § 1021, et seq., but did not include a duty to disclose "all material facts." If Congress had intended to place such an onerous burden on employers and other fiduciaries, it would certainly have done so in a direct manner.[33]

CONCLUSION

Because Plaintiffs have failed to show any proper reason for granting a writ of certiorari, Respondents respectfully request the Court deny the Petition.

Respectfully submitted,

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requirement cited by Plaintiffs is federal securities law. Plaintiffs' reasoning is circular and unpersuasive.

[33] In any event, the District Court held that the Company gave Plaintiffs all material facts of which it had knowledge. It merely believed that the Company should have reiterated its reservation of the right to amend the Plan. (FF/CL, Petitioners' Appendix at A-15).

APPENDIX A

STATUTES

15 U.S.C. § 78j:

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale, of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, 17 C.F.R. § 240.10b-5:

§ 240.10b-5

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the sale or purchase of a security.

29 U.S.C. § 1021:

§ 1021. Duty of disclosure and reporting

(a) Summary plan description and information to be furnished to participants and beneficiaries. The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) [29 U.S.C. § 1024(b)] to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan –

(1) a summary plan description described in section 102(a)(1) [29 U.S.C. § 1022(a)(1)]; and

(2) the information described in sections 104(b)(3) and 105(a) and (c) [29 U.S.C. §§ 1024(b)(3), 1025(a) and (c)].

* * *

29 U.S.C. § 1022:

§ 1022. Plan description and summary plan description
(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 U.S.C.

§ 1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 U.S.C. § 1024(b)(1)].

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1) [29 U.S.C. § 1024(a)(1)]. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D) [29 U.S.C. § 1024(a)(1)(D)].

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; and the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of

the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 U.S.C. § 1133]).

29 U.S.C. § 1024:

§ 1024. Filing and furnishing of information

* * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan. Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title –

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statement and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 103(b)(3) [29 U.S.C. § 1023(b)(3)(A), (B)] and such other material (including the percentage determined under section 103(d)(11) [29 U.S.C. § 1023(d)(11)] as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation proscribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) **Statement of Rights.** The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this title.

* * *

29 U.S.C. § 1140:

§ 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, the title, section 3001 [29 U.S.C. § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding related to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 U.S.C. § 1132] shall be applicable in the enforcement of this section.

APPENDIX B

JAMES J. TREXEL, Plaintiff v. E.I. DU PONT DE NEMOURS & COMPANY, Defendant

Civil Action No. 85-759-JRR

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

1987 U.S. Dist. LEXIS 13973

September 4, 1987

COUNSEL: [*1]

David R. Hodas, Esquire of Potter, Carmine & Hodas, Wilmington, Delaware, Attorney for Plaintiff

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OPINION BY: ROTH

OPINION: MEMORANDUM OPINION

ROTH, District Judge

Plaintiff James J. Trexel seeks an order directing defendant E. I. DuPont de Nemours & Company, Inc. (DuPont) to pay him an early retirement incentive or its equivalent under any one of several DuPont retirement plans. Trexel alleges that DuPont's failure to pay him a special retirement benefit constitutes a breach of an oral contract, a fraudulent misrepresentation and a violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et seq. DuPont disputes these allegations and has moved for summary judgment. We find no

legal basis for plaintiff's claims and grant defendant's motion for summary judgment.

I. Background.

Trexel began working for DuPont in 1950. After holding a variety of positions, Trexel was transferred to the Legal Department in 1973 where he worked until his retirement on December 31, 1984. Within the Legal [*2] Department, Trexel was assigned to a small group which handled the labeling of DuPont products, registration of pesticides and other tasks. In 1980, Trexel was promoted to head of this labeling group when the senior person retired.

In the early 1980s, at the time that Trexel was in charge of the labeling group, DuPont began a program to reduce overall costs. This was to be accomplished in part by substantially decreasing the total number of employees. As part of this plan, DuPont adopted and implemented the Voluntary Termination Incentive Program (VTIP) in 1982, which provided incentives for individuals nearing retirement age to retire earlier than planned. This new program was only offered in those departments or sites which had an excess number of employees. In 1982, VTIP was offered in the Legal Department, but Trexel chose not to retire at that time.

In the spring of 1984, Trexel proposed to William E. Kirk, Chief Counsel of the General Legal Division, that Trexel's job be eliminated by transferring his responsibilities to others. In return, Trexel would receive an early retirement incentive and retire. Kirk told Trexel he knew of no special retirement plan then in effect [*3] but

permitted Trexel to bring the matter up before William MacIntyre, one of the two Assistant General Counsels for DuPont. Trexel discussed the proposal with MacIntyre who in turn discussed it with Jack Schmutz, DuPont's General Counsel. Schmutz thought the proposal should be considered and instructed MacIntyre to explore both the transfer of Trexel's job functions and the possibility of an early retirement incentive.

In the months following the proposal, Trexel was in contact with MacIntyre as to the progress of the efforts to obtain an early retirement incentive. Trexel stated that he was confident throughout this period that there would be no problem obtaining the early retirement benefits. He was so confident, in fact, that he put his house in Wilmington up for sale as he planned to move to San Diego upon retiring. In spite of Trexel's optimism, he admitted that he had received two negative comments which made it seem uncertain that he would qualify for a retirement incentive. He also conceded that MacIntyre had never told him that his receipt of the benefits was a certainty. At best, MacIntyre had told Trexel that "things look[ed] pretty good." Eventually, DuPont's Employee Relations [*4] Department (ERD) determined that Trexel did not qualify under any existing early retirement plan.

At the same time that the early retirement incentive was being explored, efforts were being made at DuPont to transfer Trexel's job responsibilities. In the early fall of 1984, after months of discussion, the Agricultural Chemicals (AgChem) Department finally agreed to the transfer of Trexel's labeling and registration of pesticides functions. The transfer included the reassignment to AgChem

of a member of the group who assisted Trexel. An agreement was also reached by early fall of 1984 to transfer the remaining labeling functions to another department.

On October 29 or 30, 1984, Schmutz and Howard Rudge, the other Assistant General Counsel, met with Trexel and told him of ERD's decision that he did not qualify for an early retirement incentive. They then offered Trexel a position as a lobbyist in the Government Affairs Section of the Legal Department as an alternative to retirement without the incentive. The lobbyist position became available because Dan Frawley, the person who was to fill the job, won the Wilmington Democratic mayoral primary and was considered a likely winner in the [*5] upcoming general election.

Trexel was very upset by ERD's conclusion and requested a review of that decision. Trexel subsequently spoke with Charles E. Welsh, a senior vice-president of DuPont and twice with Gordon Smyth, the head of ERD. The result of these meetings was only a reaffirmation to Trexel that he did not qualify for special benefits under any existing plan. Consequently, Trexel reluctantly accepted the lobbyist position to wait until the next retirement incentive was offered.

On November 15, 1984, about a week after accepting the lobbyist position, Trexel ran into Schmutz on the ground floor of the DuPont building. Trexel told Schmutz that he was going on vacation and would not begin the new job until the beginning of 1985. Even then, he would only continue working until he could obtain an early retirement incentive. In response, Schmutz stated that he had recently contacted the highest person in ERD and

had been assured that no incentive was coming in 1985 and that even if any did, the Legal Department had no excess personnel so that no one in that department would qualify, including Trexel. The effect of this statement by Schmutz, coupled with Trexel's apparent ambivalence [*6] towards accepting the lobbyist position, caused Trexel to immediately change his plans and decide to retire.

On the following day, November 16, Trexel announced his retirement, effective December 31, 1984. He left on vacation and returned in early December and worked until the end of the month. He made no further inquiries concerning a possible early retirement incentive even though rumors of such a program continued. Trexel retired on December 31, 1984.

In late January, 1985, DuPont announced a company retirement incentive program, know as Early Retirement Option (ERO), for which Trexel would have qualified if he had not retired. After the announcement, Trexel contacted DuPont with a request that it review its position with regard to his benefits. Schmutz reaffirmed that Trexel would not receive an incentive and that because Trexel had retired on December 31, 1984, he did not qualify for the ERO.

In 1984 there were two formal programs for retirement incentives. The first was VTIP, which required an excess in a particular department before the incentive could be offered. The second was the Administrative No-Work Program (ANWP). This program provided an early retirement incentive [*7] if a person's position was eliminated and the only job available required a geographic

relocation. Trexel's lobbyist position did not require relocation.

In addition to these two plans, the Severance Review Committee, the committee which had to approve the ANWP, gave a one time authorization to another department to write an employee a benefit check for an amount within five thousand dollars of what would be received under the ANWP. Such a payment was never made to any other employee and was never pursued by the Legal Department on Trexel's behalf or on behalf of anyone else.

During November, 1984, at the time that Trexel and Schmutz had their conversation on the ground floor of the DuPont building, Gordon Smyth, the head of ERD, was conducting a review of the company-wide rolls and developing a recommendation to the Executive Committee of the Board of Directors that the company consider a broader incentive program in 1985. It is undisputed that Mr. Schmutz did not know at the time he made his statements to Trexel on November 15 that such a review was in progress. At the end of November, 1984, Smyth made his recommendation to the Executive Committee. Thereafter, a task force [*8] was appointed to develop a specific proposal.

Sometime around the middle of December Schmutz learned about the work of the task force. He concluded that he should not advise Trexel of that work for several reasons. First, his statements to Trexel in November had been truthful. Second, the information had been given to him in his position as General Counsel and was, therefore, privileged. Third, the work of the task force was in

the planning stages and no concrete decision had been reached. Fourth, it would be difficult to tell Trexel without revealing the same information to other employees.

On January 4, 1985, the formal proposal of the task force outlining the ERO was presented to the Executive Committee. On January 11, the plan was approved and it was announced on January 29, 1985, about one month after Trexel retired. Had Trexel still been an employee of DuPont, he would have qualified for the ERO at the time it was offered.

II. Discussion.

Federal Rule of Civil Procedure 56(c) provides that a party is entitled to summary judgment if the pleadings and record show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter [*9] of law. In reaching this determination, the burden is on the moving party. *Adickes v. S.H. Kress, Co.*, 398 U.S. 144, 157 (1970). The Court must view any factual inferences drawn from the evidence in a light most favorable to the non-moving party. *Id.*

Plaintiff's amended complaint contains two counts. Count I outlines Trexel's state law claims and alleges that: (1) DuPont breached its contract with Trexel to provide him with a retirement incentive, and; (2) DuPont, through Mr. Schmutz's statements to plaintiff on November 15, 1984 and a failure to subsequently correct those statements, tortiously and wrongfully misrepresented to Trexel that there would be no early retirement incentive upcoming in 1985 and that plaintiff would not qualify even if one were upcoming. Plaintiff contends that,

because of these alleged actions by defendant, he [sic] entitled to benefits under the VTIP, the ANWP, the 1985 ERO, or equivalent benefits in the amount of $44,497.37 [sic]

Count II contains plaintiff's claims under ERISA wherein Trexel contends he is entitled to the same benefits he seeks in Count I. Under ERISA plaintiff alleges that: (1) DuPont breached its fiduciary duty to Trexel by failing to keep [*10] him fully informed of plans for the ERO programs of 1985 as well as by failing to fulfill an agreement to pay a retirement incentive; (2) DuPont constructively discharged Trexel by terminating his job functions and offering him the lobbyist position, and (3) DuPont discriminated against Trexel by deliberately providing him with misinformation.

A. Preemption of State Law Claims by ERISA.

ERISA contains a broad preemption provision which states:

> Except as provided in subsection (b) of this section, the provisions of this subchapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title. . . .

29 U.S.C. § 1144(a). Thus, ERISA preempts any state law which relates to employee benefit plans. Plaintiff's state law claims for breach of contract and tortious misrepresentation would, therefore, be preempted by ERISA if they relate to an employee benefit plan. *See Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd,*

___ U.S. ___, 106 S.Ct. 3267, 91 L.Ed. 2d 558 (1986); *Kuntz v. Reese*, 760 F.2d 926, 934-35 (9th Cir. 1985); *Haeffle v. Hercules, Inc.*, [*11] No. 85-722 (D. Del. June 8, 1987).

The preemption provision of ERISA is to be read broadly to effect the intent of Congress to establish an integrated, uniform regulatory scheme with respect to ERISA plans. *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985); *McMahon v. McDowell*, 794 F.2d 100, 106 (3d Cir. 1986). A law "relates to" an employee benefit plan if it "has a connection with or reference to such a plan," rather than if it simply covers specific subjects which are covered by ERISA. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-98 (1983).

Plaintiff has admitted in his amended complaint, and it is clear to the Court, that the DuPont VTIP, ANWP and 1985 ERO plans were all governed by ERISA. Amended Complaint para. 21. Therefore, any state law claim for benefits under any of these plans is preempted by ERISA. Preemption does not mean that plaintiff is left without, [sic] an avenue of redress for the alleged wrongs. Where ERISA does not specifically address the issues of contract formation and misrepresentation, federal common law will be applied as "necessary to fill in intersticially [sic] or otherwise effectuate the statutory pattern enacted in the large by Congress." [*12] *Haeffle*, slip.op. at 6 (*quoting Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3d Cir. 1982) (*quoting United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973)).

Plaintiff contends, however, that his claim for a lump sum payment is not related to any of these plans and, thus, is not preempted. Plaintiff claims that DuPont could

have avoided breaching its contract with Trexel without resorting to any of the benefit plans under ERISA by simply writing him a check from funds outside of these plans which approximated the amount he would have received under the ANWP. Trexel bases his position that he is entitled to such a payment on a memo from C. W. Borden, Jr. (Borden Memo), in which Borden discusses the payment of a similar lump sum to another DuPont employee.

We find that Trexel's claim that he is entitled to a one time payment outside of a qualified benefit plan, [sic] has absolutely no basis in fact. The record in this case, which includes Trexel's own deposition testimony, gives no indication that there was ever even an offer made by the plaintiff, let alone an acceptance by DuPont, which focused on such an open ended payment of benefits. Trexel testified [*13] throughout his deposition that under the contract he understood that he was to receive a special retirement benefit only if he qualified for it under some existing plan:

> If they could determine that I would qualify, then we would go ahead with eliminating my job. The two were tied together.

(Trexel dep. at 38).

> Q. At that time did you have in mind that there was some incentive program under which you would qualify?
>
> A. Yes.

(*Id.* at 35).

Q. So as of May 3, 1984, the only incentive program that you had in mind you qualified for was the [VTIP]. Is that correct?

A. And whatever this vague program that applied to me as a result of the contact with MacIntyre.

(*Id.* at 59).

Q. During the period up until October 28, 1984 what was the retirement incentive you expected to receive?

A. Again, I assumed – no one had – and this sort of, on hindsight – well I assumed, and no one ever told me when I asked, that it was this vague incentive that was equivalent to a [VTIP] which later turned out to be the administrative no-work incentive.

(*Id.* at 89).

Q. And when you made the proposal, the only specific retirement incentive program that [*14] you had in mind was the [VTIP] program. Is that right?

A. That was what I – I believe so.

(*Id.* at 107).

Q. If I understand what you're saying, it is that as of the end of the meeting you had learned that there was a program under which you might or might not qualify for an incentive and Mr. MacIntyre was going to investigate that?

A. Yes.

(*Id.* at 109) (emphasis added).

Thus, Trexel's own understanding was that he would receive the incentive benefit only if he qualified under a DuPont program. There is no evidence that the one time payment made to another DuPont employee, memorialized in the Borden Memo, was anything other than a special incentive given to one employee to encourage him to go with another corporation that had purchased the business and needed his expertise. The Borden Memo itself is the only evidence which in any way touches on this lump sum payment, but it make no mention of the authority or circumstances surrounding the payment or even the amount paid. Moreover, there are no facts in the record to indicate that such a payment was made under an existing plan for which Trexel could have qualified or that there was an agreement, outside of any existing [*15] plan, to make such a payment. Without such factual evidence in the record, there is no basis upon which we might permit plaintiff's claim on this issue to proceed to trial.

B. ERISA Claims.

1. Breach of Fiduciary Duty.

Trexel's claim for breach of fiduciary duty under ERISA is divided into two distinct claims, one for misrepresentation and one for breach of contract. Trexel's misrepresentation claim arises from Mr. Schmutz's statements to Trexel on the ground floor of the DuPont building on November 15, 1984.

Plaintiff has conceded that DuPont had no obligation under ERISA to provide him with information on the

upcoming ERO before the plan went into effect. *See Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 435 (4th Cir. 1986); *Sleichter v. Monsanto Co.*, 612 F.Supp. 856, 859 (E.D. Mo. 1985). Trexel's argument centers on the contention that once Schmutz chose to speak on November 15, he imposed upon DuPont the duty to correct the statement when Schmutz became aware that it was at least partially wrong.

However, it appears to be a distinction without a difference. Nothing in the statutory language of ERISA indicates that there is a duty to disclose information on benefit [*16] plans before they take effect. Moreover, we could find no federal case law to support plaintiff's conclusion that there is an exception to this rule. On the contrary, there are many cases which state that such a duty does not exist, although plaintiff's suggested exception is not an issue in these cases. *See, Stanton*, 792 F.2d at 435; *Fine v. Steel*, 699 F.2d 1092, 1094 (11th Cir. 1983); *Fenton Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982); *Sleichter*, 612 F.Supp. at 859; *Sutton v. Weirton Steel Div. of National Steel*, 567 F.Supp. 1184, 1196 (N.D. W.Va. 1983). We will not read an exception into the statutory language or federal common law interpreting that language where none currently exists. Consequently, Trexal [sic] has no legal basis for maintaining a claim for misrepresentation under ERISA.

In addition, the principal holding in the *Stanton* case was that the plaintiff was not a "participant," under ERISA, in the future benefit plan since it went into effect after he retired. As a result, Stanton lacked the standing and subject matter jurisdiction to sue for benefits under the plan. Such a holding also applies to Trexel.

ERISA [*17] defines "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer . . . or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7). A civil action under ERISA may only be brought by a plan "participant," "beneficiary," "fiduciary," or the Secretary of Labor. 29 U.S.C. § 1132(a)(2). This is both a jurisdictional and a standing requirement. *Stanton*, 792 F.2d at 434.

The "may become eligible to receive a benefit" language in the statute does not refer to an employee who retires before the plan is implemented but rather to a "current employee who was already covered by the present terms of a plan, but who has not yet acquired enough tenure for his benefits to vest." *Id.* at 435. *See also Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 227 (5th Cir. 1981); *Haeffle v. Hercules, Inc.*, No. 85-722 (D.Del. June 8, 1987). Trexel was not in the category of an employee who needed more time to allow his benefits to vest. Therefore, in addition to there being no duty to disclose information on a pending benefit plan, Trexel [*18] has no standing nor jurisdiction to sue for damages on the 1985 ERO since he retired before the plan was ever approved, announced or implemented.

Trexel also claims a breach of fiduciary duty based on DuPont's alleged failure to uphold its contractual obligation to provide him with a special retirement benefit under one of the ERISA benefit plans. Unfortunately for Trexel, however, the evidence is undisputed that he did not qualify for benefits under any of these programs.

Whether or not DuPont diligently pursued its investigation into whether Trexel qualified under the VTIP or ANWP is irrelevant if he did not qualify. Trexel does not contend that the decision that he did not qualify was arbitrary or capricious, the applicable standard for such a denial of benefits, but contends merely that it was not diligently pursued. If diligence in pursuit would have led nowhere, the assiduity of that pursuit is then irrelevant.

In order for the breach of contract claims to be cognizable under ERISA, plaintiff must show the elements of a contract: an offer, acceptance, and consideration. Restatement (Second) of Contracts §§ 17, 22, 71 (1981). As we stated previously in regard to Trexel's [*19] claim for a lump sum payment outside of an ERISA plan, Trexel testified that he understood his "offer" to be that MacIntyre would investigate to see if there was a program under which he would qualify, and, if there was, he would retire under that plan. At the same time, DuPont would try to transfer Trexel's job functions.

MacIntyre testified that his understanding of Trexel's proposal was basically the same. DuPont did not promise anything but was simply going to investigate Trexel's proposal. There is no evidence in the record that DuPont promised Trexel a special retirement incentive in exchange for eliminating his job. Even if Trexel's proposal could be considered an offer, in the absence of an acceptance or promise by DuPont to give Trexel such a benefit, DuPont cannot be contractually bound by that.

2. Constructive Discharge.

The doctrine of constructive discharge can apply to actions under ERISA for benefits. *Devine v. Xerox Corp.*, 625 F.Supp. 603, 608 (D.Del. 1985). The applicable standard in a claim for constructive discharge is whether "the employer knowingly permitted conditions of [employment] so intolerable that a reasonable person subject to them would resign." [*20] *Id.* (*quoting Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 888 (3d Cir. 1984)).

Plaintiff has not placed into the record any facts which even come close to establishing the necessary intolerable working conditions, or even a factual dispute as to these conditions. To the contrary, it is undisputed that Trexel was offered a responsible and desirable position as a lobbyist which would afford him the opportunity to remain with DuPont in the Legal Department at no reduction in salary. Trexel's counsel contends Trexel was very uncomfortable about taking on a new job at such a late stage in his career and that Trexel knew nothing about the lobbyist position. Accepting all of these facts as true, there is no hint of the intolerable conditions necessary to maintain an action for constructive discharge.

3. Discrimination.

Plaintiff's final complaint is a halfhearted claim for discrimination under ERISA, 29 U.S.C. § 1140. Section 1140 renders it unlawful for an employer to discriminate against an employee "for the purpose of interfering with the attainment of any right to which such participant may

become entitled under the plan." The purpose of this section is to "prevent unscrupulous [*21] employers from discharging or harassing their employees in order to prevent them from obtaining their statutory or plan-based rights." *Zipf v. American Telephone & Telegraph Co.*, 799 F.2d 889, 891 (3rd Cir. 1986).

Trexel's claim centers on DuPont's failure to properly investigate Trexel's possible qualification for an incentive plan as well as its failure to keep Trexel informed as to the planning for the 1985 ERO.

First, we reassert our previously stated conclusion that Trexel was not a "participant" in the 1985 ERO plan, as he retired before it was approved or effectuated. Therefore, Trexel has no standing to sue for discrimination under § 1140 with respect to this plan. *See Stanton*, 792 F.2d at 434, 435. Moreover, we have also ruled that the employer has no duty to reveal information about a new benefit plan while it is still in the planning stages. *See Id.* at 435. Consequently, Trexel would also be precluded on these grounds from maintaining a discrimination action based on DuPont's failure to keep Trexel informed of the planning for the 1985 ERO plan.

Furthermore, even if plaintiff were a participant and there was a duty to keep plaintiff properly informed, Trexel [*22] does not proffer sufficient facts to meet the legal standard for maintaining an action under § 1140. Both the legislative history and case law indicate that, in order to have discrimination under § 1140, there must be "harassment or adverse treatment of a particular employee which amounts to or threatens 'constructive discharge' and which is carried out for the purpose of

interfering with the employee's attainment of future benefits." *Phillips v. Amoco Oil Co.*, 614 F.Supp. 694, 721 (N.D. Ala. 1985) (*citing West v. Butler*, 621 F.2d 240 (6th Cir. 1980)).

Senator Hartke's comments, on behalf of his proposal that the Secretary of Labor be directed to establish administrative procedures for enforcing § 1140 reenforce the conclusion of the *Phillips* and *West* cases.

> Especially vulnerable are managers and executives whose substantial pension potentialities provide an incentive to their discharge before vesting. The managers of the bill ought to think twice too. Discipline and discrimination can be so unpleasant as to amount to a constructive discharge, a term used by the National Labor Relations Board. That can be the type of harassment which does not say that one is [*23] fired, but makes living such a hell that a person wishes he did not have to hang on and endure.

119 Cong. Rec. 30374, *reprinted in* Legislative History at 1774-75 (emphasis added).

Trexel has not alleged any conduct by DuPont which could amount to harassment or constructive discharge in order to keep Trexel from remaining at DuPont long enough to vest. The question of Trexel's vesting is not an issue here. In fact, it was at Trexel's specific request that the transfer of his job functions was accomplished at all. Then, when it became obvious that Trexel did not qualify for any retirement incentive, he was offered the lobbyist position. Such conduct cannot be considered discrimination in any respect.

Defendant's motion for summary judgment is granted.

ORDER

On this 4th day of September, 1987, for the reasons set forth in the Memorandum Opinion of this date,

IT IS ORDERED that DuPont's Motion for Summary Judgment is hereby granted.